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The impact of deregulation in the transport sector in the United States on the Canadian transport industry

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**THE IMPACT OF DEREGULATION IN THE
TRANSPORT SECTOR IN THE UNITED STATES
ON THE CANADIAN TRANSPORT INDUSTRY**

Submitted by Richard Jonathan Lande

for the Degree of Ph. D.

of the University of Bath

1991

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TABLE OF CONTENTS

SUMMARY	1
PREFACE	3
INTRODUCTION	7

CHAPTER 1:

GENERAL THESIS OVERVIEW - HYPOTHESES AND POSTULATES	11
--	-----------

PART I : THE PROBLEM OF CANADIAN RAILWAY TRAFFIC DIVERSION

CHAPTER 2:

EXTENT OF TRADE BETWEEN CANADA AND THE UNITED STATES AND DESCRIPTION OF TRANSBORDER RAIL TRAFFIC	22
Introduction	22
a) MEASUREMENT OF TRANSBORDER TRADE BETWEEN CANADA AND THE U.S.	23
b) RAILWAYS IMPLICATED IN TRANSBORDER CANADA/U.S. TRADE	27
c) RAIL COMMODITIES IMPLICATED IN TRANSBORDER CANADA/U.S. TRADE ..	30
d) RAIL ROUTINGS IMPLICATED IN TRANSBORDER CANADA/U.S. TRADE	36
Conclusions	43

CHAPTER 3:**EXAMINATION OF TRANSBORDER FREIGHT DIVERSION FROM
CANADIAN RAILWAYS SUBSEQUENT TO UNITED STATES DEREGULATION:**

CP RAIL	46
Introduction	46
a) CASE OF LUMBER DIVERSION FROM BRITISH COLUMBIA ORIGINS TO NORTHEASTERN U.S. DESTINATIONS	48
b) CASE OF WOODPULP FROM WESTERN CANADIAN MILLS TO NORTHEASTERN U.S. DESTINATIONS	50
c) CASE OF TRAFFIC ATTRITION ON OVERHEAD MOVEMENTS	53
d) CASE OF QUEBEC NEWSPRINT PAPER DIVERSION FROM CP RAIL TO CONRAIL ROUTING	58
Conclusions	60

CHAPTER 4:**EXAMINATION OF INCREASED INTRAMODAL U.S. RAIL COMPETITION
AND ITS IMPACT UPON CANADIAN RAILWAY REVENUES: CP RAIL DATA**

Introduction	63
a) CASE OF FLORIDA AND LOUISIANA CITRUS JUICE ROUTING DIVERSION ...	64
b) GREATER COMPETITIVENESS IN U.S. RAILWAY PRICING STRATEGIES - CASES OF SODIUM CHLORATE, SYNTHETIC PLASTICS, POTASH AND SCRAP METAL	66
c) EXTRA-TERRITORIAL REACH OF THE U.S. ANTI-TRUST LAWS	69
d) REVENUE LOSS DUE TO DIFFERENCES IN REGIMES OF LIABILITY	70
e) U.S. EXEMPTION OF BOXCAR TRAFFIC FROM ECONOMIC REGULATION	71
f) INABILITY OF CANADIAN RAILWAYS TO PARTICIPATE IN JOINT BIDDING FOR TRANSBORDER CONTRACTS	71
Conclusions	72

CHAPTER 5:**QUANTIFICATION OF TRANSBORDER FREIGHT DIVERSION FROM**

CANADIAN RAILWAYS SUBSEQUENT TO UNITED STATES DEREGULATION:

CANADIAN NATIONAL RAILWAY DATA	77
Introduction	77
a) CASES OF PREFERRED ROUTE SHORTHaulING INVOLVING WOODPULP, LUMBER AND SULPHUR	78
b) CASE OF RENEGOTIATED DIVISIONAL ARRANGEMENTS DUE TO THREAT OF U.S. ROUTE CANCELLATION	79
c) COORDINATED PRICING STRATEGY WITH U.S. SUBSIDIARY ON OVERHEAD MOVEMENTS	80
d) EXTRA-TERRITORIAL REACH OF U.S. ANTI-TRUST LAWS	81
Conclusions	81

Chapter 6:

**EXAMPLES OF REVENUE ATTRITION BASED UPON DIFFERENCES
BETWEEN THE NATIONAL TRANSPORTATION POLICIES OF CANADA AND
U.S. - SUBMISSIONS OF INDIVIDUAL SHIPPERS AND SHIPPERS'**

ASSOCIATIONS	84
Introduction	84
a) INDUSMIN LTD.	85
b) CANTERRA ENERGY LTD.	87
c) POTASH CORPORATION OF SASKATCHEWAN	88
d) GREATER COMPETITIVENESS IN U.S. RAILWAY MARKETING PRACTISES AND PERFORMANCE - CASE OF NOVACOR CHEMICALS LTD.	89
e) CANADIAN CHEMICAL PRODUCERS ASSOCIATION	90
f) CANADIAN FERTILIZER INSTITUTE	91
Conclusions	92

CHAPTER 7:

COMMODITY FLOW DATA OF THE CANADIAN TRANSPORT

COMMISSION	93
-------------------------	-----------

TABLE OF CONTENTS

v

Introduction	93
a) DESCRIPTION OF DATA BASE	94
b) DESCRIPTION OF COMPUTER MODEL	94
c) FOREST PRODUCTS FROM BRITISH COLUMBIA TO U.S. NORTHEAST REGION II	96
d) MINING PRODUCTS CTC FROM SASKATCHEWAN TO U.S. NORTHCENTRAL REGION II	99
CONCLUSIONS TO PART I	101

PART II: PROCESS OF DYNAMIC STRATEGY SELECTION BY PRESSURE GROUPS AND POLICY FORMULATION BY THE CANADIAN GOVERNMENT IN RESOLVING THE PROBLEM OF TRANSBORDER TRAFFIC DIVERSION

Chapter 8:

CANADIAN REGULATORY ENVIRONMENT PRIOR TO PROCESS OF

LEGISLATIVE CHANGE	104
Introduction	104
a) REGULATORY ENVIRONMENT	105
b) DEFINITION OF THE TERM "SHIPPER"	107
c) "CAPTIVE" AND "COMPETITIVELY LOCATED" SHIPPERS	107
d) "LARGE" AND "SMALL" SHIPPERS	108
Conclusions	110

CHAPTER 9 :

INDIVIDUAL SHIPPERS - ANALYSIS OF STRATEGY SELECTION AND

POLICY RECOMMENDATIONS	112
Introduction	112
a) COL-PAC LUMBER COMPANY	114
b) INDUSMIN LIMITED	115
c) ALCAN SMELTERS AND CHEMICALS LIMITED	116

d) UNION CARBIDE CANADA LIMITED	117
e) CANADIAN SUPERIOR OIL LIMITED	119
f) CANTERA ENERGY LIMITED	120
g) POTASH CORPORATION OF SASKATCHEWAN SALES LTD.	121
h) NOVACOR CHEMICALS LIMITED	126
i) NORANDA SALES CORPORATION	128
Conclusions	129

Chapter 10 :

SHIPPERS' ASSOCIATIONS - ANALYSIS OF STRATEGY SELECTION AND POLICY RECOMMENDATIONS	135
Introduction	135
a) LACK OF TRADITIONAL COOPERATION AMONG SHIPPERS' ASSOCIATIONS ..	137
b) INTERRELATIONSHIP BETWEEN SHIPPERS' ASSOCIATIONS AND FEDERAL GOVERNMENT	138
c) ATLANTIC PROVINCES TRANSPORTATION COMMISSION	139
d) BOARD OF TRADE OF METROPOLITAN TORONTO	143
e) COUNCIL OF FOREST INDUSTRIES OF BRITISH COLUMBIA	145
f) CANADIAN INDUSTRIAL TRANSPORTATION LEAGUE	149
g) CANADIAN PULP AND PAPER ASSOCIATION	156
h) CANADIAN CHEMICAL PRODUCERS ASSOCIATION	161
i) CANADIAN MANUFACTURERS ASSOCIATION	165
Conclusions	168

CHAPTER 11:

PROVINCIAL GOVERNMENTS - ANALYSIS OF STRATEGY SELECTION AND POLICY RECOMMENDATIONS	176
Introduction	176
a) PROVINCE OF NOVA SCOTIA	179
b) PROVINCE OF NEW BRUNSWICK	182
c) PROVINCE OF QUEBEC	188

d) PROVINCE OF MANITOBA	192
e) PROVINCE OF ALBERTA	196
Conclusions	200

CHAPTER 12:

CANADIAN RAILWAYS - ANALYSIS OF STRATEGY SELECTION AND POLICY

RECOMMENDATIONS	207
Introduction	207
i) CANADIAN PACIFIC RAILWAY	210
a) ISSUE OF NON-RECIPROCITY WITH U.S. LEGISLATION	211
b) ASSESSMENT OF NEGATIVE FINANCIAL IMPACT DUE TO BILL'S PROVISIONS	213
c) FREE-TRADE POSTPONEMENT STRATEGY	216
d) THE NATIONALISM STRATEGY	217
e) LACK OF RESPONSIVENESS TO SHIPPERS' ARGUMENTS	217
f) CANADIAN SENATE HEARINGS	218
ii) CANADIAN NATIONAL RAILWAY	219
a) CAPTIVE SHIPPER TESTIMONY	220
b) STRATEGIC INCONSISTENCIES	221
c) STRATEGY PRESCRIBING U.S. RAILWAY USAGE OF THE ACT	222
d) "FREEDOM TO MANAGE" STRATEGY	224
Conclusions	225
CONCLUSIONS TO PART II	226

PART III: THE CANADIAN LEGISLATIVE SOLUTION -

NATIONAL TRANSPORTATION ACT, 1987

CHAPTER 13:

FINAL OFFER ARBITRATION	230
Introduction	230
a) PROCEDURE	233

b) STRATEGIC CONSIDERATIONS	235
c) FOA CASES SINCE ENACTMENT OF CANADIAN LEGISLATION	236
d) CONCLUSIONS REGARDING EFFECTIVENESS OF FOA STRUCTURE	240

Chapter 14 :

PUBLIC INTEREST EQUITY APPEAL	243
Introduction	243
a) PROCEDURE	243
b) STRATEGIC CONSIDERATIONS	244
c) EQUITY APPEAL CASES SINCE ENACTMENT OF CANADIAN LEGISLATION ..	245
d) CONCLUSIONS REGARDING EFFECTIVENESS OF EQUITY APPEAL STRUCTURE	249

CHAPTER 15:

COMPETITIVE JOINT LINE RATE APPEAL	253
Introduction	253
a) PROCEDURE	253
b) STRATEGIC CONSIDERATIONS	256
c) CASES OF COMPETITIVE JOINT LINE RATE APPEALS	257
d) CONCLUSIONS REGARDING THE EFFECTIVENESS OF CLR STRUCTURE	259
e) CONCLUSIONS TO PART III	260

CONCLUSIONS	264
--------------------------	------------

BIBLIOGRAPHY	273
---------------------------	------------

SUMMARY

This thesis examines the necessary regulatory interrelationship between trading nations within a continental economy. The divergence of transport policies between Canada and the United States occurred with the enactment of the Staggers Act in 1980. The negative commercial consequences of this disharmony in rail regulation and the remedial Canadian legislative process which ensued are analyzed within the substance of this work.

In Part I, the economic problem of Canadian rail traffic diversion due to the U.S. deregulation is examined. A brief description of the 1980 changes to the U.S. rail legislation, as well as statistical data which demonstrates the alteration to Canada/U.S. trans-border freight traffic flows is presented. It is determined that the diversion of freight volumes was perceived by Canadian railways and shippers to have been caused by U.S. rail deregulation, and that this constituted a sufficiently serious problem to warrant remedial legislation by the Canadian government.

Part II focuses upon dynamic considerations of strategy selection within the process of the Canadian legislative reform. It includes a description and analysis of the activities, submissions and strategic direction taken by Canadian pressure groups to influence the legislative process and thereby attempt to resolve the problem of traffic diversion and modify the national transportation policy of Canada.

In elaborating upon the strategic choices which were selected by the diverse pressure groups, including the carriers, provincial governments and shippers' associations, a compilation is made of the dynamic and interactive considerations which the Canadian policy decision makers weighed in their determination of a new legislative solution. For example, how was the Canadian government required to modify its status quo legislative objectives due to its priority of maintaining the "sovereignty" of Canadian domestic transport regulation, while concurrently adapting its international traffic to U.S. deregulation? How did the Canadian government react to the representations of the above opposing pressure groups?

Part III represents the determinate policy formulation which was accomplished by the Canadian

regulatory authorities. This section includes a description and critical interpretation of certain specific regulatory mechanisms within the 1988 Canadian transportation law which were intended to resolve the traffic diversion problem as tested in Section I, as well as to be equally sensitive to the pressure group considerations as analyzed in Section II. The difficulty of devising Canadian legislation to meet the objectives sought by shipper and provincial pressure groups in favour of intramodal rail competition is examined in the context of geographical industry captivity and a Canadian rail duopoly.

PREFACE

During the past ten years, from 1980-1990, I have had an unparalleled opportunity to analyze regulatory changes to Canadian national transportation policy from the perspective of a participant in the process. Much of the information and data upon which the thesis is based results from my own direct involvement in the elaboration of the problem of transborder attrition (Part I), the formulation of recommendations for remedial legislation (Part II) and the experimentation with the appeal mechanisms foreseen in the statutory solution (Part III).

The preface has been included in order to describe my personal involvement in the process of legislative change which is discussed in this thesis as well as explain the access which I had to certain sources of data which were examined herein.

In 1981, I was given the task as manager of economic development for Canadian Pacific Ltd. (subsequently referred to as CP Rail) to assess the impact of U.S. deregulation upon the company's rail freight revenues and to recommend the appropriate corporate lobbying strategy so as to counteract any long-term negative effects.

During 1981-82, I organized a company-wide effort to examine the gains or losses of actual and/or potential revenues which could be attributed to the sudden change in U.S. rail legislation. I initiated this project with presentations to gatherings of CP Rail marketing representatives at the eight regional centres of the company (Montreal, Toronto, Winnipeg, Vancouver and New York, Detroit, Chicago and Portland). The data which was subsequently gathered enabled me to hypothesize, on a preliminary basis, that CP Rail had indeed suffered significant revenue losses and that there did not appear to be any likely reason why such losses would not continue into the future unless the apparent cause of this revenue attrition i.e. the disharmony between U.S. and Canada's rail legislation, was addressed by the Canadian government.

I then persuaded CP Rail's vice president of marketing that the company should formally approach Canada's Minister of Transport in order to request a policy reformulation which would stem

the problem of traffic diversion. After numerous meetings with counterparts from Canada's other transcontinental railway, Canadian National (herein referred to as CN), it was decided that the presidents of both railways would claim, in a formal letter to the Minister of Transport, the Hon. Jean Luc Pepin, a cumulative loss of \$100 gross million attributed to U.S. deregulation in order to urge the Canadian government to remedial legislative action. This amount was derived exclusively from the preliminary calculations based upon my CP Rail study, as CN had not at that stage, conducted its own empirical research into the subject of transborder traffic diversion.¹ Minister of Transport Pepin acceded to the joint railway petition and subsequently directed the Canadian Transport Commission to conduct a public inquiry into the impact of U.S. rail deregulation on (deriving from the Staggers Rail Act of 1980) Canadian railways and shippers.²

This led to a series of three successive governmental investigations into the question of the effects of Staggers upon the Canadian transportation industry under three different Ministers of Transport from 1983 to 1985.³ The information gathered during these public hearings and the debate concerning possible reform which was engendered during this lengthy inquiry process provided the nucleus of data and public opinion upon which the Government white paper, entitled "Freedom To Move", was based. This white paper, released in 1986 by the Honorable D. Mazankowski, appointed Minister of Transport under the newly elected Mulroney government, constituted the blueprint for the Bill which became Canada's new National Transportation Act in January 1988.

Therefore, the examples of transborder diversion which were contained in my CP Rail research and the resulting joint railway letter to Minister of Transport Pepin which I drafted in 1983 appear to have set into motion the above public inquiry process which, combined with the political desire to effect a changed transport policy under a new government, have resulted in the present, now amended Canadian legislation.

In 1985, I resigned from both my position at CP Rail in order to set up my own legal practice specializing in rail transportation. One of my first retainers was from the Council of Forest Industries of British Columbia, which mandated me to draft their regulatory submission on the proposed legislation to the Transportation Subcommittee of the Canadian House of Commons; I was similarly requested to draft the parliamentary submissions of the Canadian Retail Shippers Association. In 1986, the fourteen largest shippers' associations in Canada formed the Coalition of Concerned Shippers, which was the "umbrella" organization representing the great majority of the proponents of the draft of the government's transport

rail bill. I was the Coalition's only lawyer and wrote both the House of Commons and Senate submissions for this pressure group, as well as participated actively in the strategy selection by this group from 1986 until the National Transportation Act was proclaimed into law, effective January 1, 1988.

Since the enactment of the new national transport policy in 1987, I have assisted approximately eighty companies in the drafting and at times negotiation of their respective confidential contracts with either CN or CP Rail. I have also been employed by four distinct shippers' associations, in the industries of imported automobiles, department store merchandise, pharmaceuticals and confectionary manufacturers respectively, to advise each upon the feasibility of their forming a transport buyers' group. I have personally interviewed over three hundred Canadian and U.S. manufacturers and producers in order to ascertain whether, since 1988, the two Canadian transcontinental railways were competing against one another on freight rates or service, or whether there appeared to be a tacit understanding between them to the effect that they would divide the market on a traditional basis. I have been the only attorney to represent clients attempting to utilize the final offer arbitration (four cases) and public interest equity (six cases) appeals before the National Transportation Agency since the Canadian remedial legislation has been enacted. I have also monitored public applications filed with the newly formed National Transportation Agency (herein referred to as the Agency) on a regular basis in order to assess the frequency of usage of the new legislative appeal and abandonment provisions. I have also represented Canadian shippers and/or municipalities in five rail abandonment oppositions, as well as in interswitching, joint track usage and branchline subsidy cases taken under the aegis of the 1987 legislation. There has been as yet no other work focussing on the differences between Canadian and U.S. rail regulation following the Staggers Act, nor any comprehensive interpretation of the recent Canadian rail transportation law other than my publications.

As a final addendum, it may be helpful to describe my development of the knowledge and literature available on the subject of regulatory disharmony between Canadian and U.S. transport and competition policies.

In 1980, as manager of economic development for CP Rail, I researched the legal exposure of CP Rail's continuing the practice of collective ratemaking in the face of the extra-territorial reach of the U.S. antitrust laws. I was subsequently given the corporate task of soliciting shipper support to the railway lobbying position to the effect that the Canadian government intervene with the U.S. Secretary of State in order to have the U.S. authorities give exemption to CN and CP Rail from the application of the U.S.

anti-combines legislation. To this end, I made approximately 25 public presentations to shipper associations in 1981, explaining the differences between Canadian domestic rail policy, which specifically permitted collective ratemaking, and the new U.S. transport legislation which was "undermining" the Canadian regulation applicable to Canadian railways operating exclusively within Canadian territory, but employed in transborder freight movements. The exposure of this controversial subject of extra-territorial reach, which is in direct contravention to what most people deem to be basic principles of comity between nations, was perhaps the first occasion wherein hundreds of traffic managers of Canadian manufacturers and producers were confronted with the subject of the inter-relationship between Canadian and U.S. transportation policies. I have continued to teach and write about the comparison of Canadian and U.S. transport regulations since that time.

I have spoken at approximately 100 public seminars and conferences, and published approximately 50 articles, written 7 monographs as well as participated in several newspaper, magazine and radio interviews on the subject of Canadian and U.S. transport regulation. Two of my monographs assessing the new Canadian transportation legislation were respectively published as additional segments in Canada's two largest trade journals, both with an estimated readership of 30,000. In this fashion, I have attempted to create an awareness in Canada of the importance of understanding Canadian transportation regulations, both domestic and international, in the larger context of the North American continental economy of the principle of regulatory inter-dependency between trading nations.

END NOTES

1. *My research had indicated a revenue loss to CP Rail of approximately \$35 million. As CN's plant and trackage were twice as large as that of CP Rail, the figure of \$35 gross million was simply multiplied accordingly in order to derive the cumulative loss of \$100 gross million claimed by both railways.*
2. *Letter of Minister of Transport, the Honourable Jean Luc Pepin to the Acting President of the Canadian Transport Commission, Mr. J. Gray, dated May 16, 1983 suggesting the terms of reference of a public inquiry into the impact of U.S. deregulation upon Canada, and subsequent correspondence regarding the amended terms of reference dated July 15, 1983 and July 20, 1983 respectively, which excluded the woodpulp parity issue, on the grounds that it was sub judice.*
3. *The Preliminary Report (under Section 81 of National Transportation Act) of the Canadian Transport Commission released in May 1984 was followed by the Hon. Lloyd Axworthy, then Minister of Transport, recommending to Mr. J. Marchand, President of the CTC that public hearings be conducted in order to provide a more complete investigation (letter not dated, but received May 25, 1984). A Final CTC Report (under Section 48 of the National Transportation Act) was released in 1985 and was followed by another public inquiry into the impact of Staggers on domestic Canadian traffic flows, under the instructions of the Hon. D. Mazankowski, Minister of Transport.*

INTRODUCTION

The introduction will outline the structure and basic propositions of the thesis as well as the sources of data researched.

The aim of this thesis is to examine transport policy formulation and the process of strategy selection and decision making among pressure groups in Canada as the Canadian government attempted to resolve the problem of transborder freight traffic diversion which was perceived to have been caused by U.S. rail deregulation. The signing into law of the Staggers Rail Act (herein referred to as the Staggers Act) in 1980 by then U.S. President Carter created a sudden disharmony in the national transport policies which had historically been paralleled as between Canada and the U.S.A, in that the latter country had opted for greater price competition among railways, confidential rebate contracts and an end to collective intramodal ratemaking.

This thesis poses the question of whether one could reasonably have forecasted that the transport regulation of Canada would inevitably change so as to be in balance with its largest trading partner, or whether the factors of national sovereignty and domestic rail policy would instead constitute elements of greater significance in preventing the reversal of previous Canadian commercial transport priorities.

The thesis is divided into three parts. Part I examines the problem of revenue attrition and transborder freight diversion which occurred in Canada subsequent to the passage of the Staggers Act. Several primary sources of data were used in the construction and analysis of this part.

The first source is the data I collected as manager of economic development for CP Rail in 1981-82 to assess the impact of U.S. deregulation upon CP Rail's traffic revenues, as has been described above in the preface. The results of my internal CP Rail impact study constitute one primary source of data for the testing and elaboration of the problem of bi-national traffic diversion, which is analyzed at Chapters 3 and 4.

Another source is derived from the latest data available from both the Canadian Transport

Commission (herein referred to as the CTC) and Statistics Canada on the subject of freight movements from Canada to the U.S. and vice versa. In 1988, I input certain classifications of transborder freight statistics into a Macro Lotus 1-2-3 program in order to examine the question of traffic diversion from the perspective of the additional complement of public information which was not available during the critical policy decision making process (1983-85). The results of this research are described in Part I at Chapter 7.

Another source of data includes the internal files and public reports of the Canadian Transport Commission, pertaining to the three public inquiries which were conducted by this administrative agency into the impact of U.S. deregulation upon the Canadian transportation industry from 1983-1985. I had access to these files and studied them during my term as Senior Adviser to the CTC's Research Department, a position which I held in 1985, on leave of absence from CP Rail.

The final sources of data are speeches, governmental submissions and news reports regarding-Canada/ U.S. transborder trade during the period under review.

In understanding the first Part of the thesis which focuses upon the evaluation and the analysis of the problem of transborder traffic diversion, one factor is worthy of immediate note. Firstly, it is not my intention to prove that the losses in revenues incurred by the Canadian railways subsequent to 1980 were caused by the enactment of the Staggers Act. Although such an hypothesis is plausible, it would require a rigorous examination of the question of direct causality and would necessitate the establishment of a scientific basis to discredit possible counter-arguments that such losses may have been due instead to economic recession or to the greater competitiveness between Canadian railways which may have been in a strict sense unrelated (except in the concurrence of time) to U.S. deregulation. Instead I have structured the thesis upon the logical premise that such revenue losses were generally perceived to have been caused by the sudden changes to the U.S. rail legislation. As a consequence of this perception, Canadian pressure groups underwent an extremely interesting exercise of strategy selection and decision making in order to influence the Canadian government to find an appropriate solution. The description and analysis of this strategic process and the interpretation of the legislative solution which was enacted in consequence by the Canadian Parliament in 1987, constitutes Part II and III respectively of the thesis.

Part II of this thesis examines the dynamic process of strategy selection by various categories of Canadian pressure groups, each attempting to recommend their preferred legislative solution to the problem of transborder traffic diversion explained in Part I. This segment evaluates the substantial evolution in policy formulation by Canadian shippers and shippers' associations between 1982-1987. The

interaction within and between pressure groups is analyzed and their compromises in tactical decision making studied. Part II also examines the struggle which ensued between the Canadian shippers and railways, each lobbying for a seemingly irreconcilable and opposing policy option. Additionally, the reaction by the Canadian federal government to the efforts of these pressure groups, as well as to the policy positions of provincial governments, is examined. An assessment is made of how the Canadian government policy makers were required to modify their legislative objective of accommodating U.S. deregulation, due to their priority of maintaining the sovereignty of the Canadian domestic transport infrastructure from possible dominance by U.S. carriers.

The sources of data used in the development of Part II include the public and private submissions to the CTC, by these different classifications of pressure groups. In order to accurately assess the evolution of strategies of these pressure groups, use of the internal files of the CTC, as well as all public briefs has been made. The CTC files, to which I have already indicated that I had access in my position as Senior Advisor to their Research Department in 1985, were useful to my understanding of the preliminary interviews which were conducted informally by CTC inquiry officers Graham and Harris in 1982, as well as the Canadian government's ongoing internal and external reaction to the lobbying efforts of the pressure groups.

Additionally, my own involvement as a legal advisor to individual shippers and shippers' associations, which has been described in the preface, constitutes a further source of data researched for the development of Part II.

Whereas Part I of the thesis thus describes the problem and Part II analyzes the dynamic process of strategy selection by pressure groups, Part III evaluates on the legislative solution ultimately decided by the Canadian government. This segment will describe certain prominent elements of the 1987/88 legislation and interpret whether they have been effective in resolving the above - cited problem of regulatory disharmony or in addressing the concerns of pressure groups which were examined during the aforementioned CTC and Parliamentary hearings.

The thesis also addresses the legal problems associated with harmonizing international and domestic transport rail policies. In this regard, the extra-territorial reach of the U.S. antitrust laws and the differences between competition regulations in Canada and in the U.S.A. provide useful examples for analysis. Lastly, the objective of devising regulation to encourage intra-modal competition is assessed in the context of locational shipper captivity and of the rail duopoly in Canada.

Part III critically assesses whether from the preliminary data available since January 1, 1988, the Canadian legislative solution appears to be accomplishing the objectives for which it was designed. The recent trends on the one hand favouring confidential contracting and the formation of shippers buyers' groups and on the other hand, exhibiting a near-absence of final offer arbitration, joint track usage or aggressive intra-modal rail competition is examined.

The sources of data for Part III as they pertain to post-1988 developments and trends have been taken primarily from the Canadian remedial statute, as well as from the mandates which I have received in the course of my legal practice. The cases of final offer arbitration and public interest equity appeals which are analyzed in Chapters 13 and 14 respectively involve cases in which I have acted as counsel to the respective plaintiffs. These have been the only cases of arbitration and equity appeals initiated before the National Transportation Agency from 1988-90.

In conclusion, the introduction has outlined the essential structure of the thesis: the problem of regulatory disharmony between Canadian and U.S. railway legislation (Part I), the process of strategy selection among Canadian pressure groups (Part II), and the remedial policy formulation by the Canadian government (Part III). For each Part, the primary sources of data were described, as well as the first hand access which my career opportunities gave me to gather this information.

CHAPTER 1:

GENERAL THESIS OVERVIEW - HYPOTHESES AND POSTULATES

When the United States Congress in 1980 deregulated the rail freight industry, little thought was given as to how this development would affect its neighbour to the North and principal trading partner, Canada. The transport regulatory structures of the two countries had up until then closely paralleled one another, as railways in both countries were considered in the dual legislation to be instruments of public policy, providing essential service in the public interest. Rail statutes in both countries had thus permitted collective rate-making among railways which were potentially competitors and had enforced price transparency by obligatory rate publication and by prohibition of secret rebates.

This joint nation policy discouraging intramodal competition had resulted in "shippers", the purchasers of freight transport service, receiving a uniform price, dependent upon their commodity, from any North American (excluding Mexico) origin to destination movement, irrespective of which combination of railways were involved or which routing was selected.

Moreover, rail rates applicable to several cities within an entire region were often "grouped" equally together and rates between competing ports and between competing regions were frequently equalized so as to discourage any preference being given to one shipper's transport costs over another. For example, both Canadian railways extended the identical freight rate to all lumber shippers, irrespective of size or location, from the west coast of British Columbia to any destination within the New England states. Similarly, the U.S. railways offered the very same rate to all lumber producers originating in the Pacific Northwest states, moving to the same destinations.

This historical bi-national transport policy had been intended to encourage regional economic development in that a producer or manufacturer would not be prevented from locating at a site which was more distant from market nor deterred from marketing a smaller quantity of goods due to higher transport

costs.

When the sudden divergence of transport policy occurred in the United States in 1980 with the enactment of Staggers, the general assumption was that this would have no significant impact upon Canada's national trade or traffic flow patterns. One of the underlying arguments of this thesis is that the above assumption was essentially incorrect and that the change in the regulatory structure of one country's transportation dynamics predictably has a significant impact upon that country's trading partner.

The logic behind such an argument is that consumers in each country would attempt to find the lowest price for substitutable goods and manufacturers would equally strive to enhance their respective profit margins by purchasing the lowest priced input commodity of equivalent quality irrespective of national origin. If one country's transport costs are less significant because of decreased regulation, this would result in that country's industry being more efficient than a neighbouring nation whose competing products were still burdened by higher transport charges.

Hypothesis I -That U.S. transport deregulation, by encouraging intramodal rail competition would likely cause an attrition of trade and traffic revenues in Canada, as the predictable cost-cutting and pro-competitive marketing practices, characteristic of a less regulated environment in the U.S., would make Canadian products and transport services, the latter still constrained by price regulation, less desirable in the international marketplace.

A variant of Hypothesis I is that this revenue attrition would apply not only to transborder trade and transport demand, where the deregulated U.S. railways would predictably be preferred over Canadian carriers, but also to domestic demand for Canadian products which were rendered uncompetitive (due to the comparatively greater transport costs in their overall price structure) with competing U.S. products serving Canadian markets.

Therefore, the objective of Part I is to test whether revenue attrition and traffic routing diversion did in fact occur in Canada following U.S. rail deregulation and to a sufficiently sizeable degree which would constitute a serious problem for transport planners, strategists and policy-makers. It should be understood that during the period under review (1980-1990), there has been an absence of any theoretical analysis regarding the necessary inter-relationship between the transport regulatory environments of trading countries within the North American continental economy or of the losses which occurred to Canadian trade and traffic flows following U.S. deregulation. The tendency has been for those involved in North American railway policy and planning to have viewed these economic losses in isolation and not to have linked the recent Canadian legislative "solution" with the causal problems of transborder diversion

and disharmony of national transport policies.

Due to this lack of industry sensitivity to the regulatory context of commercial problems such as the loss of market share, or of product demand, Canadian shippers and carriers were not at first predisposed to jointly discussing or measuring their negative revenue experiences following U.S. rail deregulation. Part I of this thesis should validate or negate the belief held by some Canadian government planners that a serious economic problem had not arisen following Staggers, or that if the problem did exist, it was not related to the divergence of bi-national transport policies. For example, the Canadian Transport Commission issued a preliminary impact report in 1983 which concluded that since shippers had generally not come forward with specific examples of revenue loss which could be solely attributed to U.S. deregulation, it did not warrant amending the existing Canadian legislation. The CTC instead suggested that whatever revenue attrition was being experienced was instead due to other causes, such as a slump in the lumber market related to an economic recessionary style in 1981-82.

The longer term measurement found in Part I at Chapter 7 of the thesis will demonstrate whether the 1983 CTC prognosis was accurate.

Part I of the thesis will also evaluate whether the Canadian transportation industry generally perceived the losses of revenue which were being experienced between 1980-1984 to have been caused by U.S. deregulation or by some other factors.

Whereas Part I of the thesis concentrates on identifying the problem of transborder traffic diversion and testing whether this problem was both of a sufficient economic magnitude and causally linked to bi-national regulatory divergence, Part II focuses upon the process of strategy selection and policy formulation which Canada underwent between 1983-1987 in order to solve this problem.

There were four principle categories of pressure group participants in this process of strategic Canadian regulatory change, each group having differing strategic plans for transport policy modification, and Part II has been structured so that each constituency could be evaluated independently in terms of intra-group conflict/synergy and their respective dynamics of decision-making.

Differing postulates and hypotheses were tested within this framework of assessment and applied to each category of pressure group. For example, with regard to individual shippers, what strategic behavioural patterns could one logically anticipate to occur ?

Hypothesis II -That shippers would predictably seek greater competition between Canadian railways due to the expectation of lower freight rates and thus be in favour of new legislative

measures similar to U.S. deregulation.

The reasoning behind such a hypothesis is that shippers would logically be in favour of lower freight rates which would result from active price and service competition between CN and CP Rail. Therefore they would be in favour of confidential rate contracts, secret rebates and anti-collusive penalties for rail carriers, similar to the newly modified U.S. transport policy.

Hypothesis III -That shippers would exhibit different strategic positions based upon their respective size, market share, or captive/competitive rail location in that the larger and/or competitively located shipper would anticipate greater railway rate discounts and thus tend to be in favour of deregulation.

Logically, those Canadian shippers which generated the most rail revenue through their sizeable traffic volumes would anticipate higher rate reductions than a company which gave the same rail carrier fewer loads, once tariffs were no longer standardized nor published. These shippers would reasonably be expected to take a position in favour of deregulation. By contrast a small shipper whose volumes would not give it the expectation of obtaining rate discounts would likely be in favour of a more regulated environment which guaranteed tariff publication and rate transparency.

Similarly, a Canadian company located in a city which was serviced by both CN and CP Rail would predictably favour pro-competitive policy changes, as compared to a shipper located in an area geographically captive to only one railway.

A variant of Hypothesis III is that shippers which were the Canadian subsidiaries of U.S. multinational firms would be more likely to be in favour of policy reform similar to Staggers. The logic in support of this variant was that U.S. multinationals, having in many cases benefitted, due to the 1980 U.S. legislation, from rail deregulation, would likely influence their Canadian subsidiaries in favour of similar transport policy changes occurring in this country. By contrast, competitive risks would appear greater to Canadian companies which had no previous experience with confidential contracts or rail rationalization.

A further variant to Hypothesis III which was tested at Chapter 9 is that individual shippers would formulate recommendations which would encompass both their own economic interests as well as those of the railways (Win-Win Strategy), rather than displaying a self-serving and antagonistic lobbying position (Win-Lose strategy).

The second category of pressure group was Canadian shippers' associations. The following hypotheses and variants were examined with regard to the strategic behaviour of such industry associations

in their attempts to devise a solution to the problem of Canada-U.S. transborder diversion and with regard to their recommendations toward a new national transportation policy. It was analyzed whether the associations were representative of the views of their respective membership, and whether the decision-making process employed for strategy selection was a democratic one.

Hypothesis IV -That shippers' associations would work together in order to present the government with a common set of policy plans, so as to achieve a cohesive lobbying approach, rather than permit regional base differences or inter-group competition to lead to significant strategic disparity.

The logic in support of this hypothesis was that these industry pressure groups would rationally wish to present the most effective common front favouring their respective memberships' views and would recognize that the success of their impact upon the federal government was dependent upon their formulation of a coherent and non-divisive joint series of policy recommendations.

A variant to Hypothesis IV which will be assessed at Chapter 10 is that the policy recommendations of the shippers' associations would be similar to the public submissions of the individual shipper category, and any differences could predictably be attributed to the more formal structure or divergent organizational goals of the lobbying groups.

A second variant to Hypothesis IV is that the shippers' association(s) which took the greatest degree of leadership in the policy debate would be the most effective in the context of the ultimate legislative outcome.

The third category of pressure group analyzed was the provincial governments, which lobbied the federal government of Canada for changes to rail transport policy. Of the hypotheses and postulates which Part II of the thesis examines with regard to this constituency:

Hypothesis V -That provincial governments would predictably opt in favour of their shippers' policy requirements rather than the opposing recommendations of the railways, given the more important contribution of the former group to regional economic development, taxation and voting power.

The reasoning used to support this hypothesis was that provincial governments being political entities would, in the event of an irreconcilable division of opinion regarding national transportation policy, opt in favour of their wider industrial base (i.e. manufacturers and producers) rather than the two transcontinental railways, which represented a far lower number of jobs within the province, tax dollars and votes.

A variant to Hypothesis V which is tested at Chapter 11 is that provincial governments would neither pursue as aggressive nor as specific programs of policy formulation as shipper or rail protagonists, given the much wider representational goals of such political entities and their exposure to voter sub-group alienation.

Hypothesis VI -That those provincial governments in which the majority of shippers were locationally dependent upon only one railway, would favour a more protectionist national transportation policy, since the deregulatory benefits of greater competition between two Canadian carriers would not apply to them.

The logic employed to underscore this hypothesis is similar to that of Hypothesis III in the sense that those who were positioned to benefit from lower freight rates due to the anticipated intramodal rail competition were likely to favour deregulation. Accordingly, provinces such as Nova Scotia, Alberta and Manitoba whose shipper constituencies were characterized mostly by producers local to only one railway would predictably be reticent to lose regulatory protection, whereas the provinces of Ontario, Quebec and New Brunswick whose shippers were mostly served by two rail carriers would likely be in favour of a free market orientation.

A variant of Hypothesis VI is that provincial governments would predictably be more concerned in their respective policy positions over the rights of small or captive shippers located in their northern regions than the shippers close to the U.S. border, the latter having greater access both to the trucking mode and to the greater rail transport options available within the United States.

It should be noted that the timing and degree of awareness of the problem of transborder diversion was interrelated with the level of activity which characterized Canadian pressure groups in their efforts to stimulate policy changes in the rail legislative direction. Thus, the Canadian railways were the first pressure group to become aware of the problem in 1982 and they immediately combined the elaboration and proof of the revenue attrition which they attributed to bi-national regulatory divergence with their own policy recommendations favouring collective ratemaking and expanded abandonment freedoms approximately two years before the mainstream of shippers or provincial governments were apprised of the need for legislative reform to Canada's national transportation policy. It was only after the railways had been successful in alerting the Canadian federal government that a sufficiently serious policy issue had arisen, ie. the negative impact of U.S. deregulation upon the viability of the Canadian transportation industry, that the Minister(s) of Transport ordered the three public inquiries which were conducted by

the Canadian Transport Commission as has been mentioned in the Preface. These inquiries sensitized the other pressure groups and obliged them to respond to the policy recommendations which had already been formulated by the railway lobbyists.

One of the most striking features of the development of the policy positions of both shipper and provincial pressure groups found in Part II is their evolution from being in favour of the railway recommendations in 1983-84, to their being opposed in 1984-87. This initial shipper autonomy and then the polarization of opinion as between transport users and suppliers which occurred caused a reversal of the traditional leadership position which Canadian railway spokesmen had played in transport policy formulation and the 1988 legislative solution of the Canadian government which will be analyzed in Part III as being clearly opposed to most of the railway policy recommendations, reflects the railways' loss of stature as industry-wide representatives.

This demise of the railway's role in policy leadership created an opportunity for assessment of how a pressure group would react in a "losing" situation regarding regulatory suasion. Therefore, the analysis of the Canadian railways' strategy, in Part II, is intended to evaluate certain hypotheses during a later time-frame than for the shippers and provincial governments respectively. The reason for this is both that the policy recommendations of the two Canadian railways were already elaborated in Part I in conjunction with the measurement and examination of the existence of the problem of revenue attrition and transborder diversion, as well as the above-described feature that the initial railway recommendations provided the standard against which other pressure groups subsequently reacted.

When the government draft legislation (Bill C-126) was released in 1986, the policy recommendations which had been formulated by the Canadian railways since 1982 were uniformly rejected. The hypotheses and postulates which are tested for the railways' strategic selection, faced with this defeat of both policy agenda and industry leadership are:

Hypothesis VII -That the government-owned railway, Canadian National, due to its being a crown corporation, would not publicly oppose the draft legislation as aggressively as its privately-owned counterpart Canadian Pacific.

The reasoning behind this hypothesis is that the executives of a government-owned enterprise would tend not to publicly criticize the legislative efforts of the government in power, especially in comparison to the reaction of CP Rail, a company not thus restrained by government ownership, appointment of its board of directors or requiring Parliamentary approval for borrowing.

Hypothesis VIII -That their initial strategy for legislative reform having failed, the Canadian railways would then attempt to compromise their previous policy position so that only the most negative elements of the Bill (from their perspective) might be modified during the final Parliamentary hearings.

The logic in support of this hypothesis is similar to that of Hypothesis IV in that one could reasonably assume that the lobbyists would select the most effective strategy so as to achieve some of their policy objectives rather than none. In order to salvage what was a most negative legislative response to the railways' preferred agenda for statutory reform, it was thought that the most rational course would be to concentrate their opposition exclusively upon the most objectionable portions of the draft legislation.

A variant to Hypothesis VII is also tested in Chapter 12 is that the rejection of their policy recommendations as manifested by the government's draft legislation would cause the Canadian railways to re-assess their industry image and encourage them to focus upon the changes which had occurred in industry leadership and the "winning" policy positions of the other pressure groups.

In addition to examining these hypotheses, there are three elements which are reviewed throughout Part II of the thesis. Firstly, were the strategies of each pressure group member logically presented and consistent with its own previous submissions as well as the lobbying positions of other members within the same pressure group? The effectiveness or inconsistency of certain strategic presentations is then compared to their respective success in persuading the federal government of Canada to adopt the policies recommended in the remedial transport legislation.

Secondly, how was this process of strategy selection related to the theme posited in Part I of the thesis that regulatory divergence is incompatible between trading nations in a continental economy? If it could have been predicted that U.S. rail transport deregulation would cause serious revenue attrition and traffic diversion in Canada, would it be reasonable to conclude that those pressure groups recommending policy changes which were harmonious to the new U.S. law would be preferred over those pressure groups suggesting that Canada remain regulated?

Lastly, the question of why the pressure groups chose the particular strategies and counter-strategies which they did is analyzed to see whether any general conclusions could be drawn with regard to the theory of strategy selection. For example, in weighing the advantages and disadvantages of opting for a pro-competitive strategy, the duopolist Canadian railways would have compared a wide variety of elements, such as the benefits of domestic market collective ratemaking, revenue attrition due to transpor-

der traffic diversion by U.S. railways, and the dynamics and consequences of price competition between a privately owned and a government-owned railway. After such deliberations, why did CP Rail select the "Nationalism" or "Level Playing Field" (non-reciprocity) strategies described in Chapter 12 over other possible directions?

Therefore, the purposes of Parts I and II are essentially distinct. The goal of Part I is to test whether there exists sufficient evidence to conclude that serious revenue attrition and traffic diversion occurred in Canada immediately after 1980 and that the Canadian transportation industry perceived this problem as being caused by U.S. deregulation and warranting a remedial legislative response by Parliament. By contrast, the purpose of Part II is to evaluate the process of change and to critically assess the strategy selection among Canadian pressure group members, their interaction and the effectiveness of their recommendations to alter the national transportation policy of Canada. The analysis of the patterns of lobbying behaviour demonstrated by these pressure groups was intended to advance the theoretical development of certain aspects of strategy selection. For example, the reversal of policy direction exhibited by certain shipper pressure groups between 1983 and 1985 provides a unique opportunity to review empirically the degrees of comparative public influence resulting from lobbying positions of polarity as opposed to those of compromise and avoidance of conflict.

Part III of the thesis describes the most innovative elements of the 1987-88 legislation ie. final offer arbitration, the public interest equity appeal, and competitive joint line rate provisions which the Canadian government put forth in order to solve the problem of transborder traffic diversion (Part I) after having considered the recommendations of industry pressure groups (Part II). The hypotheses and postulates which are tested in relation to this newly changed direction in national transportation policy as was manifested by these three remedial appeal mechanisms are as follows:

Hypothesis IX -That the objective which the Canadian government had set in the new regulatory framework of encouraging intramodal railway competition would not be achieved due to its permissive rather than penal statutory clauses.

This hypothesis is based upon the logical premise that duopolistic railways, which had for decades been permitted by law to act collusively and which both recognized that aggressive intramodal competition would likely diminish their respective revenues due to discounted rates and rebates, would tend not to pursue such active pro-competitive behaviour unless the law explicitly required it, with sanctions for non-performance.

Hypothesis X -That the federal government did not adequately consider the effects of market sharing practises upon Canadian shippers by previously dominant railways in that the transport users would prove unaccustomed and unwilling to publicly dispute rate decisions of the rail carriers to which they were locationally captive.

Similar to the logic which has been applied to Hypothesis IX, shippers which had manifested a pattern of non-protagonistic behaviour during previous decades of freight rate negotiations were unlikely to change their lack of propensity to initiate regulatory appeals unless the legislation recognized this customary docility and intentionally facilitated such risk-taking.

Chapter 13-15 examine each of the new statutory "solutions" proposed by the Canadian policy decision-makers so as to test Hypothesis IX and X respectively.

Assuming that the cause of the problem (as described in Part I) of transborder freight diversion was indeed the difference between U.S. rail deregulation and the former Canadian national transport policy, it would then be logical to hypothesize that a newly revised Canadian legislative solution which did not address the principle cause of the problem was destined not to succeed.

Given that Parts I and II describe the input which pressure group members presented to the Canadian government, Part III demonstrates how the regulatory authorities responded to these varied and oftentimes opposing submissions. Due to the formal and determinate nature of the legislation, Part III demonstrates which strategies ultimately proved most effective and which arguments were rejected by government decision-makers. Part III therefore constitutes the logical culmination of the process of strategy selection and policy formulation, which was initiated by the elaboration of the problem of transborder traffic diversion in Part I and substantiated by the involvement of competing pressure groups, each vying to influence the Canadian government to resolve the problem, as described in Part II.

In assessing the transport policy which was ultimately chosen by the Canadian government, the following sub-thematic questions were explored:

- (1)How effectively did the government combine domestic and international rail policy in its legislative solution?
- (2)Were the pro-competitive goals of the new legislation destined to modify the behaviour of Canadian railways and shippers equally?
- (3)Did the three specific regulatory mechanisms legislated, i.e., final offer arbitration, the public interest equity appeal and competitive joint line rates, adequately respond to pressure group

recommendations that the national transportation policy continue to protect the small or distant shipper?

(4) Considering that none of these three regulatory mechanisms were initially recommended by the pressure groups, was the Canadian government obliged to create the legislative solution due to the lack of policy consensus by transport industry lobbyists or their lack of political power?

Part III of the thesis is therefore intended to represent an evaluation of (a) the Canadian legislative solution to the problem as examined in Part I, (b) the determination of which pressure group strategies as described in Part II, were most effective, and (c) the specific policy direction chosen by the Canadian government to modify the commercial behaviour of the rail transportation industry.

PART I

THE PROBLEM OF CANADIAN RAILWAY TRAFFIC DIVERSION

CHAPTER 2:

EXTENT OF TRADE BETWEEN CANADA AND THE UNITED STATES AND DESCRIPTION OF TRANSBORDER RAIL TRAFFIC

Introduction

In order to test the ten principle hypotheses which have been posited in Chapter 1, it is necessary to examine whether a problem of transborder freight diversion did occur (Part I), how did pressure groups influence the legislative solution (Part II) and did the solution respond adequately to the problem and the representations of pressure groups respectively (Part III).

Part I therefore poses the question of whether a problem of freight diversion transpired immediately following the divergence of rail regulatory policies between Canada and the U.S., which was of such national proportions so as to warrant a change in Canada's transportation policy.

Hypothesis I -That U.S. transport deregulation, by encouraging intramodal rail competition would likely cause an attrition of trade and traffic revenues in Canada, as the predictable cost-cutting and pro-competitive marketing practises characteristic of a less regulated environment in the U.S., would make Canadian products and transport services, the latter still constrained by price regulation, less desirable in the international marketplace.

The preliminary hypothesis which is to be tested, first requires that the parameters of Canada/U.S. trade flows and of intramodal railway competition be defined in order to subsequently assess whether traffic attrition did occur. It is the objective of this Chapter to measure these parameters, as well as to identify the rail carriers, commodities and routings implicated in transborder Canada/U.S. trade.

This chapter also sets the stage for the discussion of regulatory interdependency between trading nations which constitutes one of the themes of the thesis.

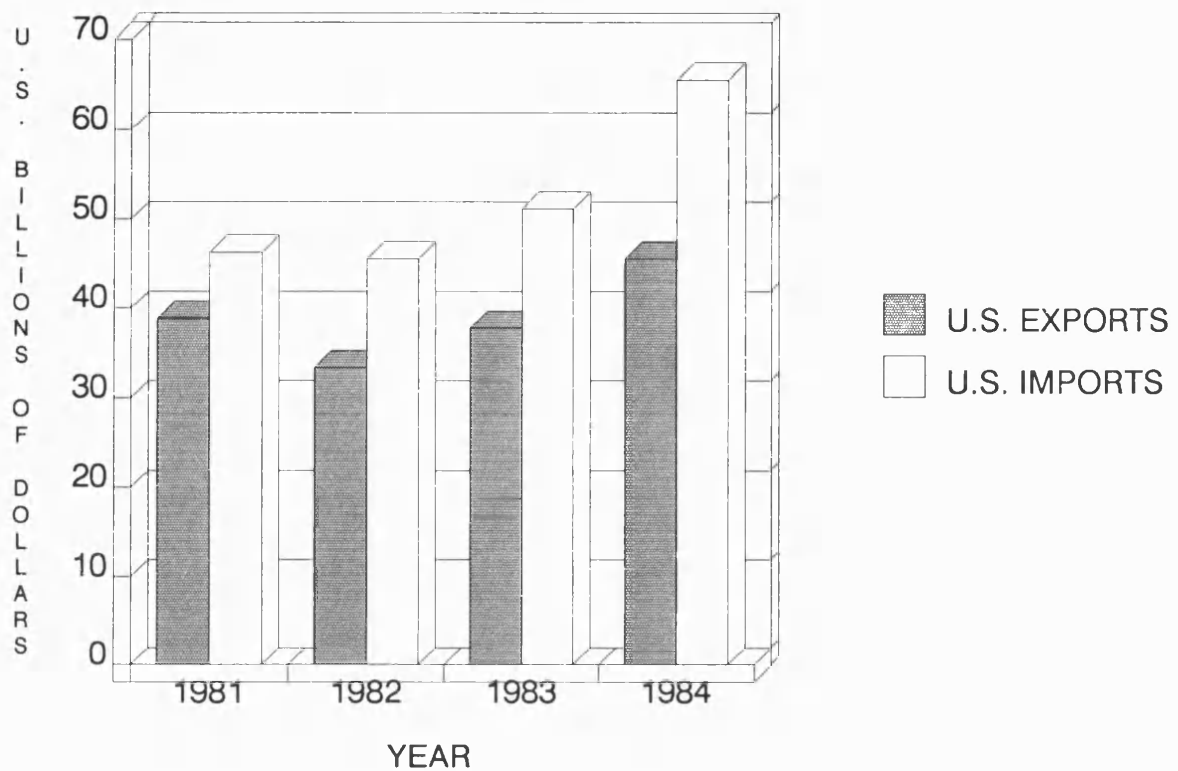
It is examined in Chapter 2 whether Canada and the United States, although distinct political entities characterized by absolute legislative independence, were nonetheless major trading partners participating in a North American continental economy. This chapter defines a number of basic railway terms which are employed throughout the thesis. For example, each freight commodity transported represents a number of manufacturing or producing companies, termed "shippers", which would constitute the railway's customers and would determine which railway routing should be selected for any given Canada/U.S. movement.

For most transborder movements, at least one Canadian railway and one U.S. railway were involved, and these railways were at times in competition with each other as well as with other railways, so as to obtain their preferred routing, which is termed their "longhaul". Thus, when deregulated U.S. railways in 1980 started offering confidential and discounted rates to Canadian shippers exporting to the U.S. market, Canadian railways were often instructed by their customers to use those routings which gave the more competitive U.S. railways haulages with the greatest mileage i.e. the U.S. carrier obtained the "longhaul" routing and the Canadian carrier, the "shorthaul".

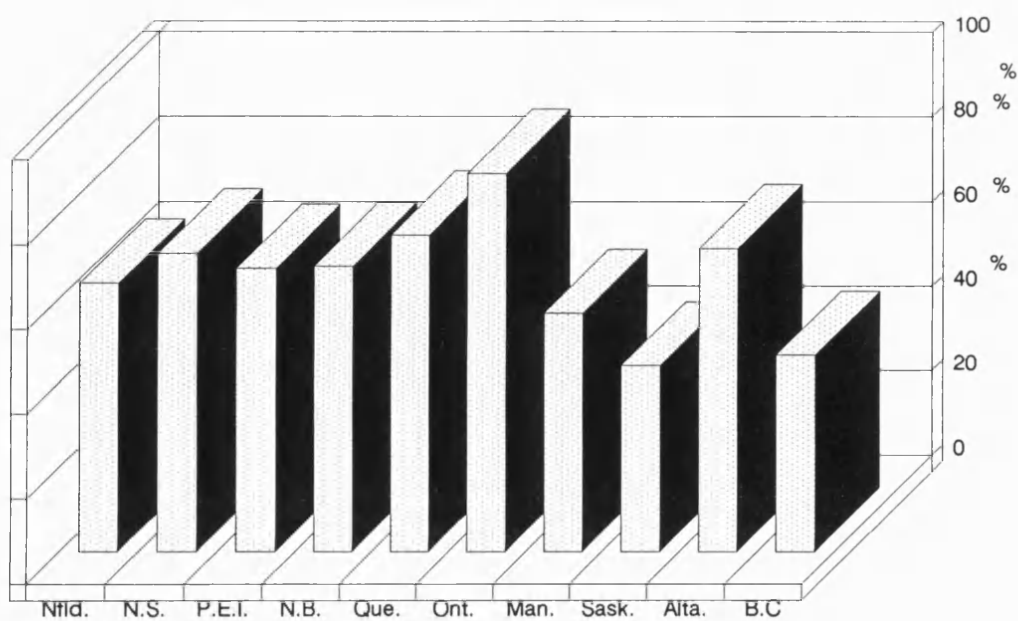
a) MEASUREMENT OF TRANSBORDER TRADE BETWEEN CANADA AND THE U.S.

Canada and the U.S.A. are each other's most important trading partners. Fully 78% of Canadian exports of goods went to the United States in 1984 and 21% of U.S. exports went to Canada. Furthermore, under the terms of the General Agreement on Tariffs and Trade (GATT), it has been estimated that approximately 80% of Canadian - U.S. trade is presently tariff-free, with 15% of the remaining 20% being subject to tariffs of 5 per cent or less.¹ Canada, with its population of 25 million, purchased \$52.9 billion of U.S. goods in 1984, almost as much as U.S. total shipments to the entire European Economic Community; this represented 72% of all Canadian imports. Charts I(a), I(b), and I(c) depict the significance of Canada/U.S. trade to imports and exports of each country.²

In 1985, the Royal Commission on the Economic Union and Development Prospects for Canada (the MacDonald Commission) recommended bilateral negotiations with the United States, with the objective of the complete elimination of tariff and other barriers to cross-border trade. This proposal for

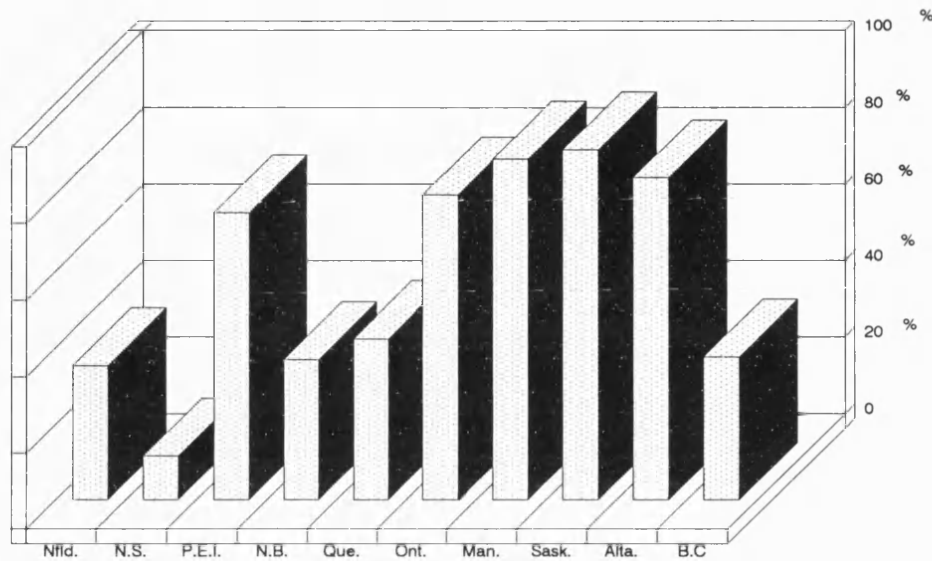
CHART I (a): U.S. TRADE WITH CANADA

Source: U.S. Bureau of the Census (1984)

CHART I (b): EXPORTS TO U.S. AS PART OF EACH PROVINCE'S TOTAL EXPORTS FOR 1987

Source: Department of Finance of Canada

CHART I (c): IMPORTS FROM U.S. AS PART OF EACH PROVINCE'S TOTAL IMPORTS FOR 1987



Source: Department of Finance of Canada

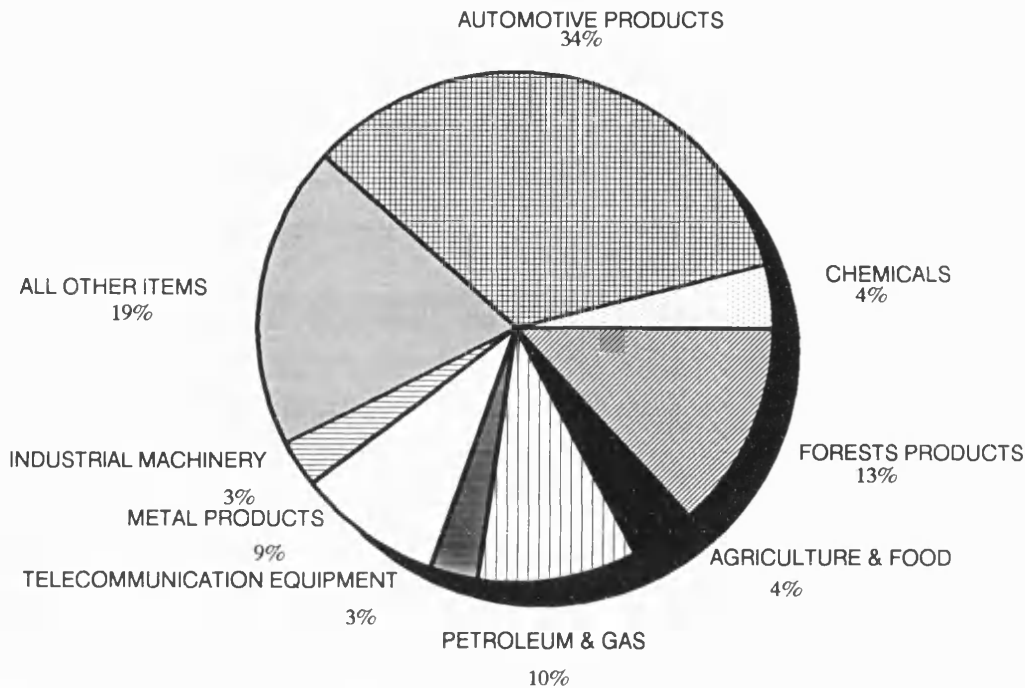
"free trade" was signed into law in 1989 by Canada and the U.S.A, and emphasized the eventual intention of allowing industries in both countries to sell their products on a continental basis, unfettered by non-tariff barriers, such as unharmonized regulation. Charts II and III demonstrate the distribution of Canadian exports and imports to and from the U.S. by generalized commodity category. It is noteworthy that many of the major classifications (automotive, forest products, petroleum, chemicals) depict products which are most efficiently transported by railroad either due to their nature or due to distance involved.³

It may be argued that since such a substantial % of Canada's GNP is attributed to exports, the latter is more dependent upon a coordinated trade and transport policy with the U.S.A. than the reverse situation. Nevertheless, although the U.S. has an internal market ten times the size of Canada's, the possible impact of trade barriers upon 21% of U.S. exports, although a smaller percentage numerically, represents an almost equivalent number of jobs and degree of regional economic exposure within the U.S.

Therefore, for the purposes of examination of the ten hypotheses which are to be tested within this thesis (and in particular Hypothesis I), it is assumed that Canada and the U.S.A. were major trading partners throughout the period under examination (1980-1990).

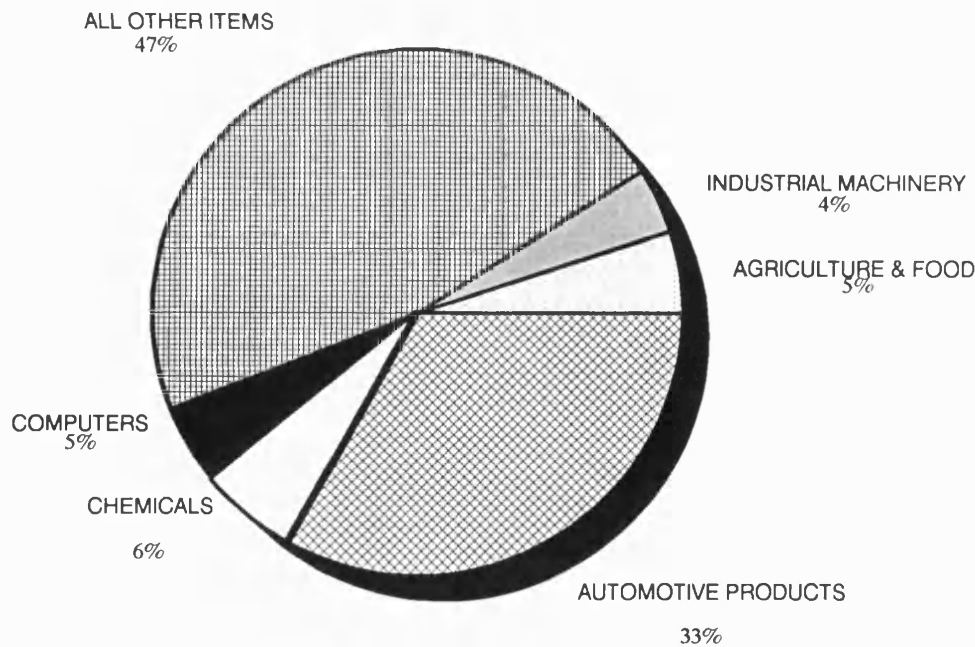
It is further assumed that for the purposes of testing Hypothesis I there was freedom of choice and the potential for shippers and consignees in both countries to determine how they wished to route that portion of the above-described transborder imported and exported merchandise which was transported by railway. Three facets of this second assumption regarding transborder traffic which will

**CHART II: DISTRIBUTION OF THE MAJOR CANADIAN
EXPORTS TO THE UNITED STATES: 1984**



Source: Department of External Affairs of Canada

**CHART III: DISTRIBUTION OF THE MAJOR CANADIAN
IMPORTS FROM THE UNITED STATES: 1984**



Source: Department of External Affairs of Canada

now be analyzed are (1) the railways (2) the commodities and (3) the routings.

b) RAILWAYS IMPLICATED IN TRANSBORDER CANADA/U.S. TRADE

In general, transportation of freight by railway from Canada to the U.S.A. is characterized by a Canadian railway hauling a given commodity in rail equipment, such as boxcars, to the border and there interchanging with a U.S. railway which will subsequently use its motive power (engines) to either individually, or sequentially in combination with other U.S. railways, move the merchandise in the same equipment to its destination. For movements between the U.S. and Canada, the situation is simply reversed. In other words, railways in North America do not generally allow the engines of other railways to run over each other's trackage. The origin carrier's railcar equipment however is customarily used for the entirety of the trip in order to avoid the need to off-load and reload at the border or at subsequent interchange points. This railcar equipment, when unloaded at destination will either be sent back empty as part of another consignment headed toward one of the owning carrier's terminals, or may be loaded with some other commodity and routed in the general direction of the owning carrier's lines; in either case the owning railway is compensated for the use of its equipment and credited against a balance established with the other railway.⁴

From a shipper's perspective, one can readily see that every time rail equipment has to be interchanged in the sequence of a combination railway movement, there is an inevitable one or two-day delay added to the length of the transit time. Thus shippers of transborder freight will tend, other things being equal, to use that combination of railways which involve the smallest number of individual carriers, even if the routing is slightly more circuitous.⁵

Moreover from the originating railway's perspective, there would be a much more frequent utilization of equipment due to better turnaround ratios, to the extent that it can keep its cars on its own line. It is for this reason that Canadian carriers offer lower freight rates to those destinations which do not require the loss of control of their equipment into the United States.⁶

In Canada, there are two railways which traverse the entire country linking the Atlantic provinces in the East with the Pacific province of British Columbia in the West: Canadian Pacific (CP Rail), formed 110 years ago, is publicly traded on the stock exchange, the largest shareholders having been in recent years Power Corporation of Canada and the Province of Quebec's pension fund, each having held approximately 10% of voting equity. Canadian National (CN) was formed by the government in the early

1920's out of several near bankrupt railways and was Canada's first major Crown corporation. CN possesses more extensive trackage than CP Rail and the former's east-west rail line takes a more northerly route (further from the U.S. border) than does CP Rail's, although both railways run directly through most of Canada's major population centres (Montreal, Toronto, Winnipeg, and Vancouver).

Both Canadian railways also own extensive rail networks in the United States, which allow them to more effectively market Canadian transborder traffic. Canadian Pacific owns three U.S. railways, the Soo Line, the ⁷ Milwaukee Road and the Delaware and Huchson Railway which operate over 4,000 miles of trackage in ten states in the U.S. Midwestern and Northeastern region. Canadian National owns the Grand Trunk Railway and the Central Vermont which operate over 2,000 miles of trackage in eight states, primarily in the U.S. Northeast.

In 1984, more than 25% of the freight revenues of CP Rail and CN, not including their U.S. subsidiaries, were derived from transborder movements to or from the U.S.A., which would represent approximately a total of one billion dollars cumulatively to both companies. ⁸

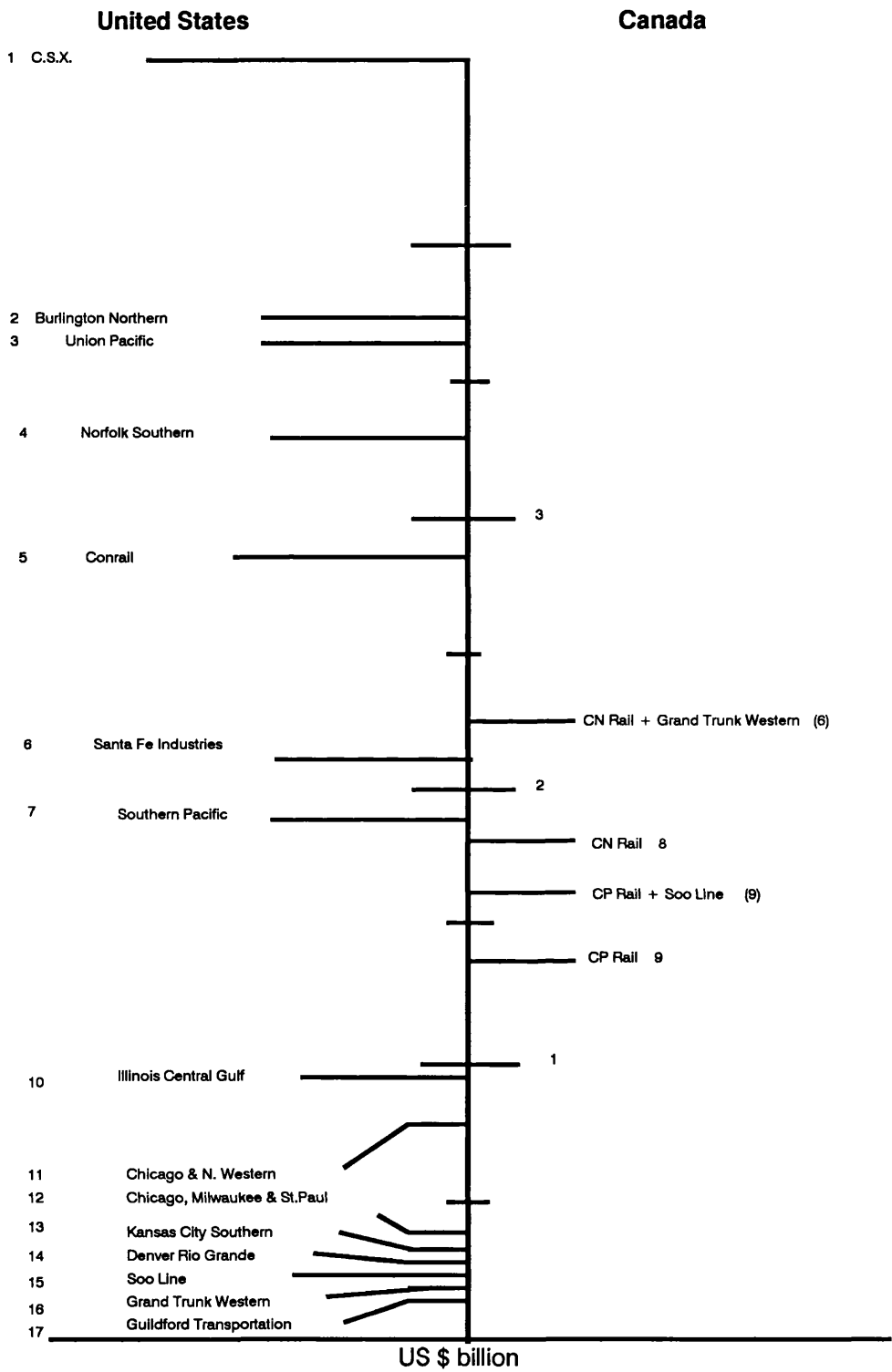
Conversely, there are four major U.S. railways which own trackage on the Canadian side of the border and could thus take transborder traffic from Canadian origins into the U.S. directly (without interchanging equipment at the border), or vice versa. These four U.S. railways are, in the west, the Burlington Northern Railway (BN), which operates directly into Vancouver and Winnipeg, and, in the eastern Canada, Conrail, operating into Montreal, as well as the CSXT Railway and the Norfolk Southern, both of which operate into Sarnia and Windsor, Ontario, respectively. These U.S. carriers are legally considered to be Canadian railways for that (relatively small) portion of their respective networks which are located within Canadian territory.

There are three factors which need be considered with regard to the competitive impact on transborder traffic by these U.S. railways owning trackage within Canadian territory.

Firstly, as can be seen from Chart IV, each of these four U.S. railways is considerably larger in assets and revenues than either of the Canadian railways individually or in combination with their respective U.S. railways subsidiaries. The Canadian transborder traffic represents a relatively minor proportion of the revenues of these U.S. carriers as compared with their U.S. domestic traffic volumes. This may account for the comparatively little interest demonstrated by U.S. carriers in attempting to influence the formulation or make use of the modified 1988 Canadian legislative provisions.

Secondly, it would not be necessary for U.S. railways to own trackage within Canada to divert

CHART IV:
ASSETS OF NORTH AMERICAN RAILWAYS



Source: Moody's Transportation Manual (1982)

transborder traffic away from Canadian railways. Any U.S. railway operating to or from one of the border interchange points could take or bring freight to the Canadian railways, which, as has been previously stated, do not cross the border with their engines as they do not own any trackage in the U.S, except in the cases of their subsidiaries.

Therefore, the BN, in addition to its Canadian trackage into Vancouver and Winnipeg, can directly compete for transborder freight traffic to or from the Provinces of Saskatchewan, Alberta and Ontario with either Canadian railway, as its U.S. trackage extends in close proximity to border points of Northgate, Saskatchewan, Coutts, Alberta, and International Boundary, Ontario respectively (see Chart V).

Thirdly, these U.S. railways may have some added operational efficiencies with regard to their own Canadian trackage in comparison with alternative railway combination movements, in that they do run their engines across the border at those few locations where they own trackage, without being obliged to interchange with another carrier.⁹

In addition to the above-described railways, there are two large provincially-owned Canadian railways, neither of which physically extends to the Canada/U.S. border: the Ontario Northland Railway (ONR) and the British Columbia Railway (BCOL). However, these two carriers do exert an impact on transborder traffic as they represent the only rail access for hundreds of U.S. export-oriented shippers of minerals and forest products situated in the northern reaches of these two provinces.¹⁰

c) RAIL COMMODITIES IMPLICATED IN TRANSBORDER CANADA/U.S. TRADE

The second facet of the above-stated assumption to Hypothesis I that there was freedom of choice and the potential for shippers and consignees in both countries as to how they selected to route their transborder traffic involves the commodities which were transported by the rail mode.

Chart VI demonstrates that of the \$54 billion worth of exports from Canada to the U.S. in 1981, (which represented 66% of total Canadian exports), \$14.7 billion (or 18% of total exports) moved by rail. Considering that the rail mode is traditionally selected for low value bulk resource movements, this amount is not fully indicative of its impact upon transborder trade. Nonetheless, this chart is useful to establish a general measure of comparison with regard to modal selection on transborder Canada/U.S. traffic.

CHART V



- AL - Alabama
- AR - Arkansas
- AZ - Arizona
- CA - California
- CO - Colorado
- CT - Connecticut
- FL - Florida
- GA - Georgia
- IA - Iowa
- ID - Idaho
- IL - Illinois
- IN - Indiana
- KE - Kentucky
- KS - Kansas
- LA - Louisiana
- MA - Massachusetts
- ME - Maine
- MI - Michigan
- MN - Minnesota
- MO - Missouri
- MT - Montana
- NC - North Carolina
- ND - North Dakota
- NE - Nebraska
- NH - New Hampshire
- NJ - New Jersey
- NM - New Mexico
- NV - Nevada
- NY - New York
- OH - Ohio
- OK - Oklahoma
- OR - Oregon
- PA - Pennsylvania
- RI - Rhode Island
- SC - South Carolina
- SD - South Dakota
- TN - Tennessee
- TX - Texas
- UT - Utah
- VA - Virginia
- VT - Vermont
- WA - Washington
- WI - Wisconsin
- WV - West Virginia
- WY - Wyoming

CHART VI: EXPORTS FROM CANADA TO U.S.
BY DIFFERING MODES OF TRANSPORTATION

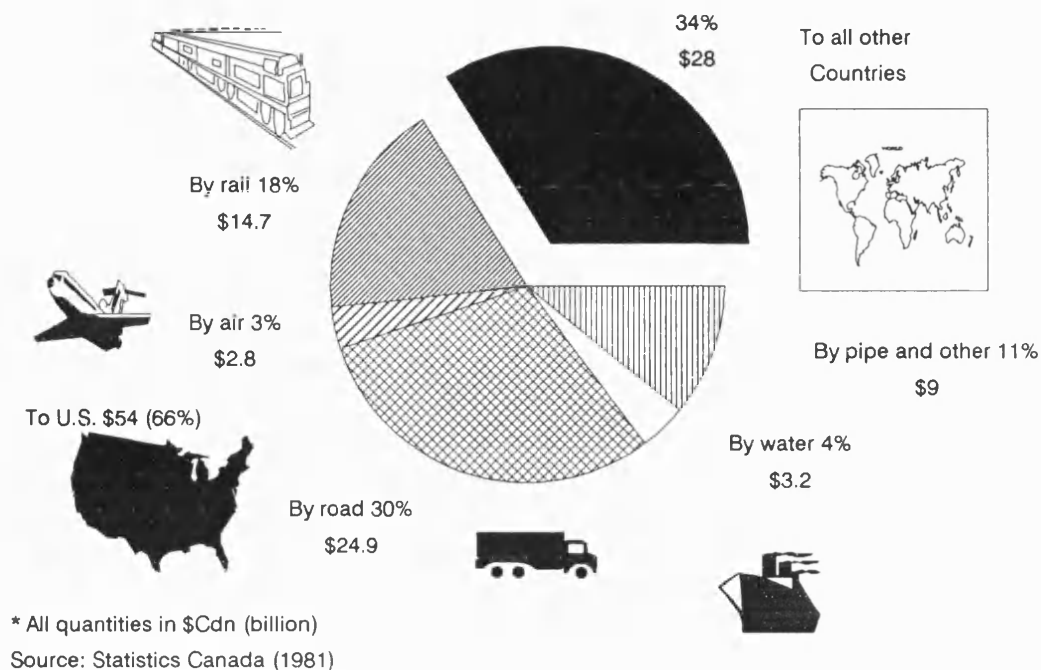


TABLE VII

RAIL TRANSPORTATION AND INTERNATIONAL TRADE (\$000 CANADIAN)			
Year	Total	To U.S.	To U.S. by Rail
Canadian Exports			
1979	65,641,259	44,534,675	12,981,265
1980	76,158,600	48,173,723	13,389,730
1981	83,677,966	55,378,174	14,801,285
Canadian Imports			
1979	62,870,705	45,571,224	6,819,346
1980	62,273,844	48,613,642	7,111,460
1981	79,129,353	54,350,280	7,709,004

Source: Exports S.C. 65-202; Imports S.C. 65-203; Rail data special computer run by Statistics Canada

Table VII confirms that between 1979-1981, the rail mode carried approximately 30% of the freight exported from Canada to the U.S.A. and approximately 15% of the goods imported, as measured

by the declared value of the merchandise.

The greater use of railways for movements from Canada to the U.S.A., as opposed to the reverse pattern, would at a first glance appear to be a confirmation of the perception that Canada provides the U.S. with a commodity mix of bulk resource products for which railways are the most efficient carriers, whereas the U.S. provides Canadians with higher value manufactured goods for which the truck mode is typically selected. This hypothesis, however, is not corroborated by Table VIII which shows that from 1979-1981 there were five times as many fabricated materials going from Canada to the U.S. by rail than in the reverse direction, and an equivalent amount of end products going by rail from and to each direction. However, this table is by itself inconclusive, as there may have been a far greater number of trucking movements of high valued manufactured goods from the U.S. to Canada during the same time period.

TABLE VIII

VALUE OF CROSS - BORDER TRADE CARRIED BY RAIL BY COMMODITY TYPE				
(\$000 CANADIAN)				
Year	Fabricated materials inedible	End Products inedible	Other	Total
Canadian Exports				
1979	8,231,710	4,217,125	532,430	12,981,265
1980	8,807,362	4,113,313	469,055	13,389,730
1981	9,474,693	4,831,269	495,323	14,801,285
Canadian Imports				
1979	1,446,973	4,635,140	737,233	6,819,346
1980	1,431,366	4,881,941	798,153	7,111,460
1981	1,527,544	5,426,841	754,619	7,709,004
Source: Statistics Canada, External Trade Division				

Another indication of the importance of the rail mode for the transportation between Canada

and the U.S.A. of certain categories of commodities may be found in an analysis of the reported revenues of CP Rail and CN. Table IX is derived from the Commodity Flow Analysis publications of the Canadian Transport Commission (CTC), a series which was discontinued in 1985 and which shall be discussed in same detail at Chapter 7. For their own internal purposes, the CTC did not include certain types of traffic in these analyses, and limited the volumes to only CP Rail and CN as compared with the other railways owning Canadian trackage which have been described in sub-section (b) above. Therefore the data is undervalued in several respects.

What Table IX demonstrates is that during the 1978-80 period, transborder traffic accounted for at least 25% of the revenues of CP Rail and CN. Furthermore, if one examines the movement of forest products, one can see that more than 95% of the movement of this commodity is directed from Canada to the U.S., as opposed to the reverse direction, and that there is almost as much demand for the movement of forest products to the U.S. as there is domestically.¹¹

Finally, Table X demonstrates another index of the importance of the rail mode to export trade from Canada to the U.S.A. - transborder tonnage carried by CP Rail and CN.

Once again, the amounts are understated as the statistical information has regrettably not included tonnages carried by the four U.S. railways which own trackage in Canada. The significant volume of automotive traffic should qualify the notion that transborder rail modal selection in Canada is restricted exclusively to bulk resource commodities.¹²

TABLE IX

CANADIAN RAILWAY REVENUE

(\$)						
		A	B	C	D	(A + B) - D
Year	Commodity	Freight to USA	Freight to CAN	Domestic *	Total Revenue	Cross-Border Traffic %
1978	Agriculture	4,145,586	11,950,882	189,417,000 ¹	205,513,468	8
	Animal	363,074	335,146	30,923	31,621,220	2
	Mines	142,425,455	27,792,045	507,445,000	677,662,500	25
	Forest	139,118,186	4,198,040	144,514,000	287,830,226	50
	Manufac. & Misc.	254,346,462	105,123,821	965,615,000 ²	1,325,085,283	27
	Total	540,398,763	149,399,934	1,837,915,000	2,527,713,697	27
1979	Agriculture	5,503,3	12,005,881	206,904,000 ¹	224,413,266	8
	Animal	381,157	300,593	30,670,000	31,351,750	2
	Mines	168,714,581	30,305,872	591,819,000	790,839,453	25
	Forest	147,618,834	5,674,218	152,944,000	306,237,052	50
	Manufac. & Misc.	309,067,140	121,714,583	1,114,621,000 ²	1,545,401,723	28
	Total	631,285,097	170,001,147	2,096,957,000	2,898,243,244	28
1980	Agriculture	6,451,358	13,606,957	223,719,000 ¹	243,777,315	8
	Animal	518,901	328,862	33,123,000	33,970,763	3
	Mines	185,325,723	37,616,883	717,896,000	940,838,606	24
	Forest	148,059,098	6,195,930	171,681,000	325,936,028	47
	Manufac. & Misc.	343,128,139	128,039,788	1,232,993,000 ²	1,704,160,927	28
	Total	683,483,219	185,788,420	2,379,412,000	3,248,683,639	27

1. Includes statutory grain

2. Includes piggyback traffic

Source: Commodity Flow Analysis 1978-80 All-Rail between Canada and United States

TABLE X

METRIC TONNAGES OF SELECTED COMMODITIES DELIVERED TO U.S. RAIL BY CANADIAN RAILWAYS (1980)	
COMMODITY (CODE)	
Fertilizantes & Fertilizer Materials (418)	1,170,893
Potash (416)	6,000,366
Sulphur (288, 290)	1,559,908
Lumber (308)	4,194,489
Woodpulp (330)	3,117,772
Newsprint (334)	3,576,437
Passenger Autos (554)	292,140
Freight Autos (558)	286,676
Vehicle Parts (556)	605,444
Aluminium (480)	573,939
Liquid Petroleum Gases (450)	1,451,990
Copper and Non-ferrous Metals and Alloys (273, 333, 482-494)	333,273
Source: CTC Commodity Flow Analysis 1978 - 1980 All-Rail between Canada and the United States	

d) RAIL ROUTINGS IMPLICATED IN TRANSBORDER CANADA/U.S. TRADE

Now that the major railways and commodities involved in transborder Canada/U.S. trade have been identified, for the purposes of verifying the assumption that shippers possessed freedom of choice and the potential to choose between combinations of railways for Canada/U.S. freight movements, it is necessary to describe the process by which Canadian rail freight diversion could occur, prior to examining the question of whether it did occur and measuring to what extent.

It has already been described how the physical infrastructure of the two major transcontinental Canadian-owned railways, CP Rail and CN is mostly restricted to Canadian territory,¹³ and that a significant portion of their respective revenues accrue from movements of commodities to or from the

U.S. On any such transborder movements, it is in the Canadian railways' economic interests to maximize the extent of its haul within Canada, as the revenues it earns will be a direct function of the mileage it carries the merchandise.

Therefore, Canadian railways prefer to "control" the routing so that they can benefit from the longest haul possible through Canada prior to interchanging with the U.S. carrier, which gives them a better rate division for the remaining portion of the joint international through movement. In the situation where the Canadian carrier moves freight along a preferred routing, the U.S. railway selected is likely to be a subsidiary of that Canadian railway or where this is not feasible due to location, the U.S. railway with which the Canadian carrier has a preferential joint operating and marketing agreement. Hence the competitive challenge between the Canadian and certain U.S. railways, in any transborder movement, is for each to preserve the largest share of the mileage.

Conversely, if the U.S. railway can "control" the transborder routing, the longhaul will be to the maximum extent possible on its trackage (through the U.S.), and it will then deliver to its preferred Canadian railway partner at an interchange point of its choosing.

Table XI describes sixteen possible rail interchange points between Canada and the U.S.A., with the name of the Canadian town and the Canadian railways whose trackage serve that location listed on the left side of the page, and the corresponding U.S. name for the same border crossing and the U.S. railway(s) whose trackage is situated at that point, on the right side of the page. These same sixteen interchange points are depicted on the maps at Charts XII (A) and (B).

Despite the respective vying between Canadian and U.S. railways for the longhaul portion of transborder traffic, it has generally been either the shipper or the consignee (depending upon which paid the freight charges) which has "settled" the matter of routing selection, be it domestic or transborder. Thus, as will be demonstrated later in this Part, if the international freight rates offered by U.S. railways became lower than those offered by Canadian railways, (for example, due to U.S. deregulation), the shippers could easily divert the transborder routing from a Canadian longhaul to a U.S. longhaul.

Chart XIII provides an illustration of such transborder diversion. In this example, woodpulp originating at a mill in the Canadian province of Alberta is destined to a paper company in the U.S. Northeast (New England states). There are two possible trans-continental combination rail routings between which the shipper could choose, one mostly through Canada (CP-Conrail), and the other mostly through the U.S.A. (CP-BN-Conrail). Prior to the divergence of Canadian and U.S. rail regulatory policies

TABLE XI

RAIL FREIGHT CROSSING POINTS BETWEEN U.S. AND CANADA				
Canadian Gateway		RR	American Gateway	RR
New Brunswick	McAdam	CP	Vanceboro, ME	MEC
Quebec	Rouyn	CN	East Alburgh, VT	CV
	Huntingdon	CN	Massena, NY	CR
	Adirondack	CP	Massena, NY	CR
	Sutton	CP	Richford, VT	CV
	Cantic	CN	Rouses Point, NY	D&H, CV
	Delson	CP	Rouses Point, NY	NJ
Ontario	Fort Erie	CN	Buffalo (Black Rock), NY	CR, NW
	Windsor	CN,CP	Detroit, MI	CO,CR,NW,GT
	Boundary (suspension bridge)	CN	International Falls, MN	DW&P, BN
	Niagara Falls		Niagara Falls, NY	CR, NW
	Sarnia		Port Huron, MI	CO, GT
	Sault Ste. Marie	CP	Sault Ste. Marie, MI	Soo
Manitoba	Emerson	CN,CP	Noyes, MN	Soo, BN
Saskatchewan	North Portal	CP	Portal, N.D.	Soo
	Northgate	CN	Northgate, N.D.	BN
Alberta	Coutts	CP	Sweetgrass, MT	CN
British Columbia	Kingsgate	CP	East Port, ID	SI
	Huntingdon	CN	Sumas, WA	BN
RAILWAY ABBREVIATIONS				
BN	Burlington Northern			
C&O	Chesapeake and Ohio (CSXT)			
CV	Central Vermont (CN subsidiary)			
CR	Consolidated Rail (Conrail)			
D&H	Delaware & Hudson (New York, Susquahanna and Western)			
DW&P	Duluth, Winnipeg and Pacific Railway (CN subsidiary)			
GT	Grand Truck (CN subsidiary)			
NJ	Napierville Junction Railway			
NS	Norfolk Southern			
MEC	Maine Central Railway			
SI	Spokane International Railroad			
Soo	Soo Line (CP subsidiary)			
CP	CP Rail			
CN	CN Rail			

CHART XII(A)

RAIL FREIGHT INTERCHANGE CROSSING POINTS BETWEEN U.S. AND CANADA

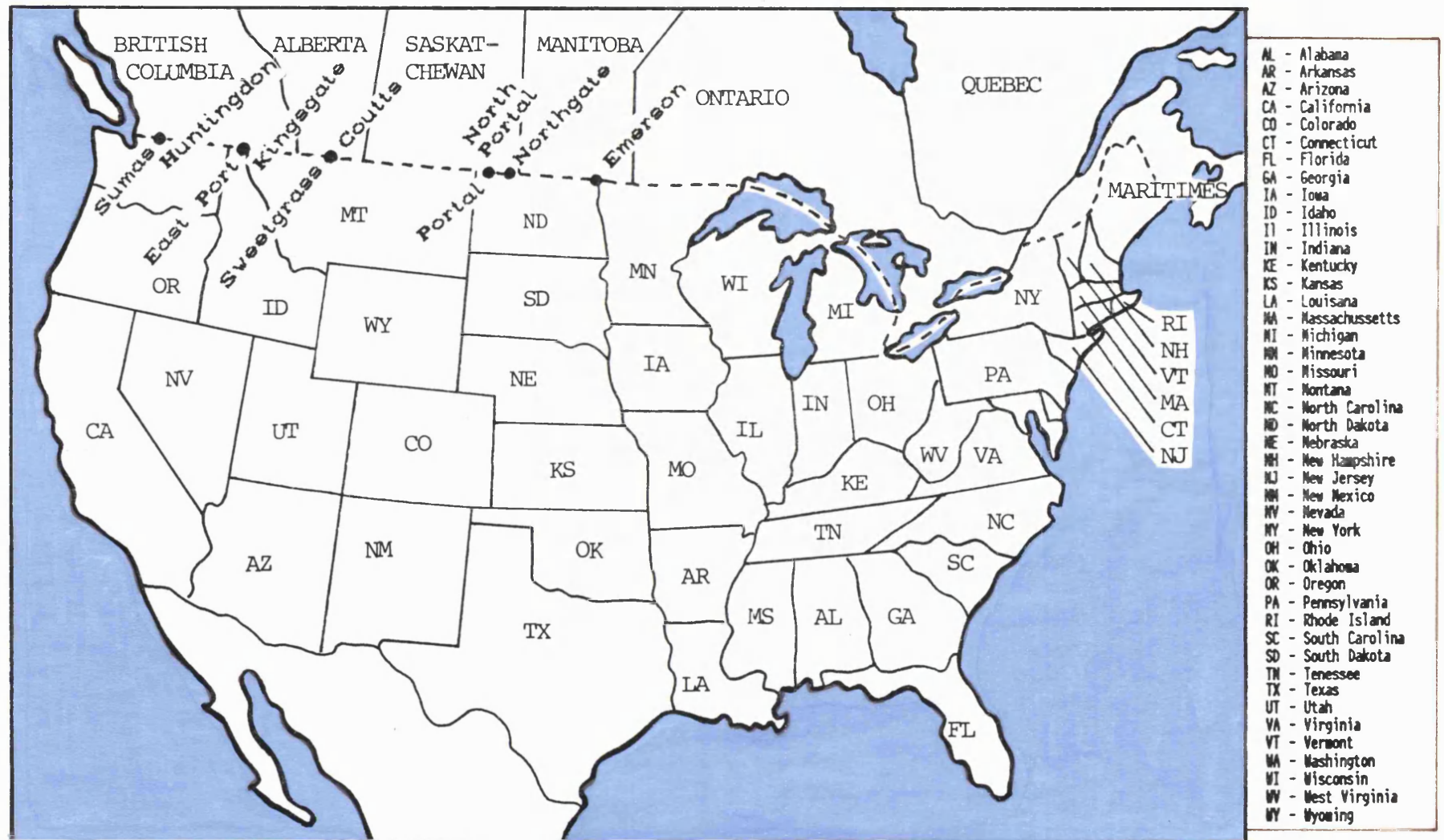


CHART XII (B)

RAIL FREIGHT INTERCHANGE CROSSING POINTS BETWEEN U.S. AND CANADA

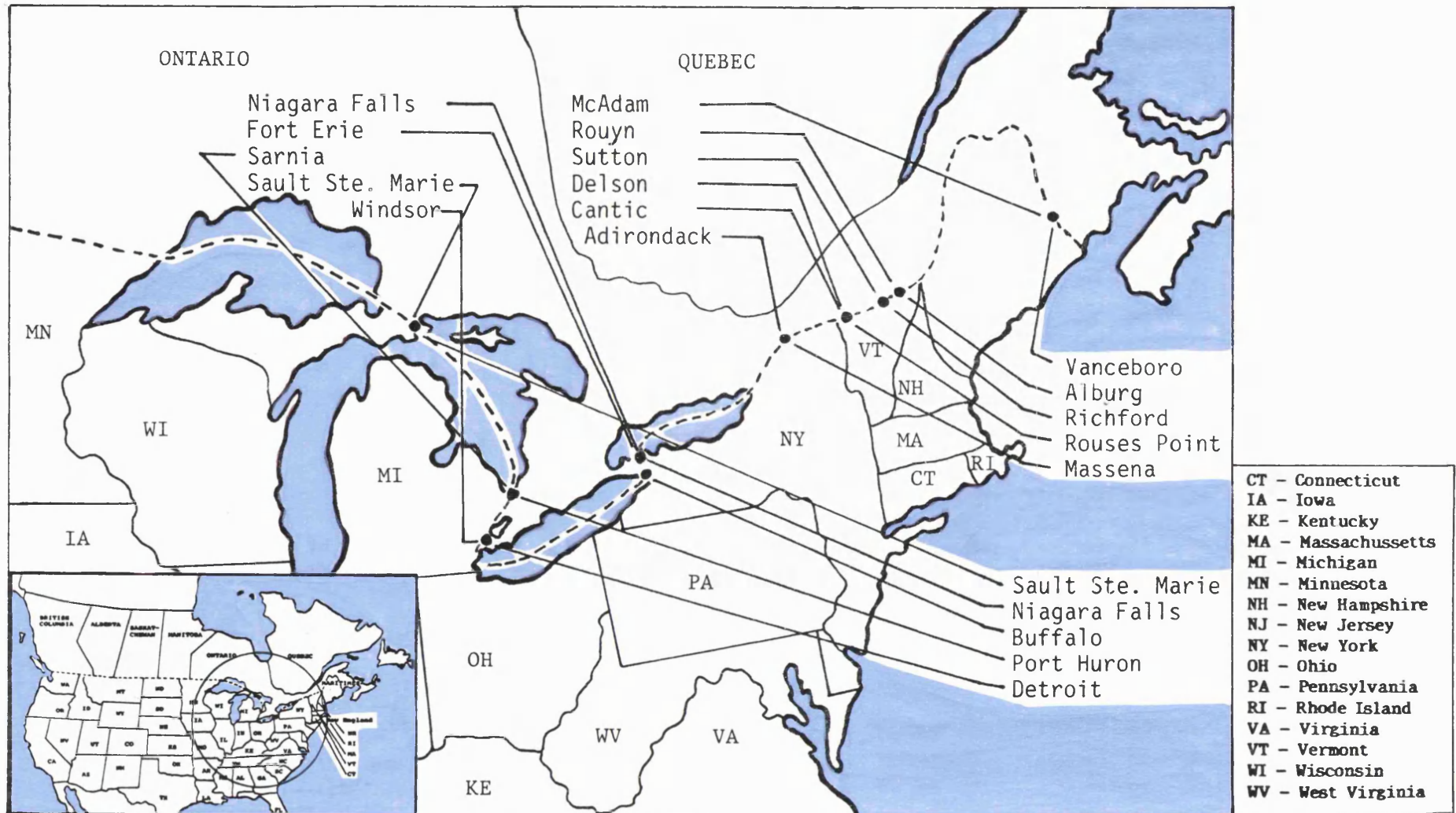


CHART XIII

CANADIAN VERSUS U.S. LONGHAUL ROUTING SELECTION: WOODPULP FROM WESTERN CANADA TO U.S. NEW ENGLAND STATES



in 1980, the rates as between the CP Rail longhaul and the BN longhaul would have been identical and the woodpulp would have typically been moved via the Canadian route, as the originating carrier, CP Rail, by supplying the railcar equipment, would have traditionally been given the longhaul.¹⁴

However, as shall be demonstrated in Chapter 3, subsequent to U.S. rail deregulation woodpulp movements were often diverted, upon the shippers' instructions, so that CP Rail would be obliged to interchange the merchandise with the BN at Coutts, Alberta and CP Rail would thus be deprived of its longhaul through Canada.

Given that a railway's revenue is a direct function of the mileage which freight is carried, one can see from Chart XIII the substantial impact that such routing diversion would have upon CP Rail's revenue. In the next chapter, the extent of this transborder routing diversion will be measured.

Finally, there are certain geographical factors which need to be considered as they have a bearing on transborder traffic flow patterns.

Firstly, the Western part of Canada (B.C., Alberta, Saskatchewan, Manitoba) represents a far less industrialized base than the Central part (Ontario, Quebec). Therefore, the example of woodpulp from Alberta, as depicted in Chart XIII could equally have been lumber from British Columbia or potash from Saskatchewan, with different border interchange points. For purposes of simplification, if one were to generalize Canadian rail movements by commodity type, one could state that resource products from the western provinces generally move eastward and manufactured products from the central provinces of Ontario and Quebec move both westward and to the Atlantic provinces; also, there is a greater number of carloads moving westward than in the reverse.

Secondly, most of the Canadian population resides in the extreme south of the country, as if there were a narrow demographic band attached to the border line in Chart XIII, i.e. within a relatively short distance from the Canada/U.S. border. Although Montreal, Toronto and Vancouver, the most populous Canadian cities, may be a few hours drive from their U.S. commercial counterparts, New York City, Buffalo, and Seattle respectively, they are all within one hour's drive from the international border. Moreover, there are several Canadian/U.S. city pairs, such as Windsor-Detroit, Sarnia-Port Huron, wherein one could access the neighbouring country within a trip of a few minutes. Therefore, most Canadian industrial bases have relatively quick access to U.S. rail lines by a short southward Canadian railway haul to one of the border interchange points described at Charts XII (A) and (B) or alternatively by a trucking movement to the above U.S. "railheads". For the four major U.S. railways whose networks

extend directly into Canada, such as BN in Vancouver and Winnipeg, CSXT in Sarnia and Conrail in Montreal, the access by Canadian shippers to these railways is that much easier.

Thirdly, the boundary between Canada and the U.S.A. does not follow a straight line, but descends from Thunder Bay, Ontario through four of the Great Lakes, forming a wedge between the U.S. Midwest and the Northeastern States. Paper products originating in the State of Maine and destined to Chicago, Illinois can move more directly through Canada, than via the circuitous all-U.S. rail alternative. This type of movement from a U.S. origin to a U.S. destination through Canada is called "overhead" or "bridge" traffic and shall be discussed in the ensuing measurement of diversion of Canadian railway traffic [for example, Chapter 3(c)].

Conclusions

There were two assumptions pertaining to Hypothesis I which were discussed in this chapter. Firstly, as one of the sub-themes of the thesis is the regulatory inter-dependence between trading nations, it was shown that Canada and the United States were major trading partners during the period under examination (1978-1989).

Secondly, it was demonstrated that there existed a multiplicity of possible and theoretically competing rail routings between any point in Canada to any point in the U.S. Railways in North America generally do not have the right to have their engines haul railcars on the trackage of other rail lines. Therefore an interchange of equipment is necessary at the border. It was also described how shippers paying the freight rates theoretically had the freedom of choice and potential to select whichever railway(s) provided a superior level of price and service. Depending upon which border interchange point were thus selected by the shipper, the Canadian or U.S. railway would derive a larger portion of the freight rate revenue, as one railway would typically obtain its "longhaul" at the expense of the connecting railways on the other side of the border.

This chapter therefore established the basic parameters necessary to an understanding of two of the critical components of Hypothesis I (as well as certain subsequent hypotheses) ie. intramodal rail competition in North America and the attrition of freight traffic revenues as related to Canada-U.S. trade. Other components of Hypothesis I, such as post-1980 regulatory disharmony between Canada and the U.S., will be explained in Chapter 3 so that the entire postulate can then be empirically tested.

Prior to 1980, the parallel rail regulatory regimes of Canada and the U.S. were structured so that

Canadian and U.S. railways did not compete for the longhaul on most transborder movements.

In the next chapter, it shall be examined whether subsequent to U.S. rail deregulation, a significant problem of routing diversion occurred wherein the Canadian railways were deprived of their customary transcontinental longhauls. It shall be discussed whether this economic problem was subsequently perceived by many within the Canadian transportation industry to have been caused by the confidential discount practices and intra-modal rail competition which the 1980 U.S. national transport policy had engendered. The following chapter will assess and quantify the extent of revenue attrition which may have been evidenced in Canada on account of this international disharmony in transport regulation.

END NOTES

1. *Report of the Special Joint Parliamentary Committee on Canada's International Relations, Ottawa, August 23, 1985. The 80% figure includes duty-free trade under the Canada/U.S. Autopact of 1965 and the Defence Production Sharing Arrangements of 1941. Also, Johnson, J. and Schachter, J., The Free Trade Agreement, Canada Law Book, Toronto, 1989.*
2. *Davis, Dennis, "Canada Wants to Cut In," Distribution, October, 1985, p. 11 et. seq. It is noted that the bar charts for 1984 of the U.S. Bureau of the Census are higher than the data cited from Statistics Canada in Chart VI. The reason may be that Chart I possibly includes both goods and services. Also, The Canada-U.S. Free Trade Agreement - An Economic Assessment, 1988 Department of Finance, Fiscal Policy and Economic Analysis Branch.*
3. *Canadian Trade Negotiations, Department of External Affairs Canada, Ottawa, December 15, 1985, pp. 27 and 33. Similarly, in an article by La Kraar entitled "North America's New Trade Punch" (Fortune, May 22, 1989) it is noted (source, U.S. Commerce Dept.) that of the \$80.9 U.S. billion in Canadian exports to the U.S., \$26.4 billion derived from vehicles and parts, and \$9.9 billion derived from machinery, including computers.*
4. *See Chapter 4(e).*
5. *When U.S. rail deregulation occurred in 1980, the heightened U.S. intra-rail competition, which occurred in part due to the loss of anti-trust immunity for collective ratemaking, resulted in a series of railway mergers as well as bilateral inter-railway operating agreements. These two developments enabled the U.S. carriers involved to become more efficient competitors because of reduced transit times.*
6. *For example, CN Rail 1988 contract rates (Interfor, Lignum, and Noranda Forest) for kiln-dried spruce, pine and Douglas fir from British Columbia origins to Eastern Canadian lumber transfer yards (LTY's) such as Windsor and Niagara Falls, Ontario, were lower as compared with this carrier's rates from the same origins to midwestern and northeastern U.S. destinations, in some cases just a few miles from the LTY's due to the loss of control over its equipment in the latter case.*

7. *As Canadian Pacific owned 56.69% of the voting capital of the Soo Line until 1989 (when CP Ltd. attempted to gain complete control of the subsidiary's shareholdings), the management of the latter were most sensitive to the interests of the minority shareholders and avoided taking a marketing or operating strategy which would be seen as disproportionately benefitting the parent railway company. In an interview with the Soo Line's CEO Dennis Cavanagh in Minneapolis in February 1988, he stated that the terms of the CP and Soo Traffic Agreement which prohibited each railway from giving transborder freight to another competing railway (for example CP to BN or Soo to CN) was being questioned, as it was perceived as too restrictive by CP Rail management. In November 1988, the Soo Line reviewed proposals for a modified traffic agreement, until Mr. Cavanaugh's termination of employment by CP directive in May 1989.*
8. *Presentation by R.S. Allison, president, CP Rail to the 1984 annual conference of the Canadian Industrial Transportation League in Winnipeg, Manitoba. CN sold the Southern Division of the Grand Trunk Railway to Emons Holding Company in 1989 and CP sold that portion of the Soo Line from Kansas to Chicago to the Southern Pacific in July 1989.*
9. *Additionally, there are three small U.S. carriers which in 1989 owned or operated trackage on the Canadian side of the border, the Wisconsin Central Railway (from the State of Michigan into the Province of Ontario), the Bangor and Aroostook Railway (from the State of Maine to the Province of New Brunswick), and the New York, Susquahanna and Western Railway (from the State of New York to the Province of Quebec).*
10. *The Ontario Northland Railway owns a subsidiary, the Nipissing Central, which runs from Ontario into Quebec (Rouyn Noranda) and is thus governed by federal statute. In interviews with P. Dymont, general manager and T. O'Connell, general counsel of the ONR, in North Bay, Ontario, in July, 1988, they stated their intention to direct the operating practices of the ONR so that the National Transportation Act continue not to apply to the parent company as a matter of corporate policy.*
11. *The "domestic" subdivision should not be regarded as designating that the end use was within Canada for two reasons. Firstly, it would include export movements (ex. a rail origin to a port for export). Secondly, an interview with J. Edgar, V.P. Distribution, Repap Ltd. in 1988, revealed that for a variety of purposes (such as lessening customs duties), a company might decide to notionally "terminate" a transborder movement at the border and issue another bill of lading under the name of its U.S. subsidiary, to destination. This transborder movement would thus appear in the CTC analysis as "domestic".*
12. *This automotive freight represents U.S. car and parts manufacturers such as G.M., Ford and Chrysler whose Canadian factories make certain models of automobiles for the entire North American market. They are encouraged in this regard by provincial tax exemptions and a federal duty-free treaty, known as the Canada-U.S. Autopact. In 1988, I served as the legal advisor to 14 imported automobile companies such as Toyota, Nissan, and Volkswagen in their freight negotiation strategies with the Canadian railways. These importers did not transport their vehicles from Japan or Europe through Canada into the U.S. except in the event of a U.S. port strike. However, Honda and Hyundai were planning to break this pattern in 1989 by making certain models in Canada for the entire North American market and are presently transporting the vehicles into the U.S. by rail mode.*
13. *One minor exception to this rule is that a small portion of CP's Rail trackage directly traverses a part of the State of Maine, from the Province of Quebec to the Province of New Brunswick.*
14. *The rates would have been identical for the two routings because CP Rail, BN and Conrail belonged, prior to 1980, to the same regional rate bureaux, wherein such rates would have been collectively set and protected from the U.S. anti-trust laws by virtue of Interstate Commerce Commission approved rate bureau agreements. See also Part II, end note #93.*

CHAPTER 3

EXAMINATION OF TRANSBORDER FREIGHT DIVERSION FROM CANADIAN RAILWAYS SUBSEQUENT TO UNITED STATES DEREGULATION: CP RAIL DATA

Introduction

The first hypothesis examined within the structure of this thesis focus upon the question of whether significant revenue attrition occurred to Canadian industry following the sudden disharmony in bi-national rail transport policy which transpired in 1980 upon the deregulation of the U.S. railway system.

The logical basis in support of the hypothesis that revenue attrition would occur is that many North American companies, once given the choice, would likely select the lower priced transport services of U.S. railways which the Staggers Act would make possible by allowing rate confidentiality, price differentiation and intramodal competition. Thus, according to this hypothesis, Canadian railway longhauls on transborder movements would likely be replaced by U.S. railway longhauls and Canadian products competing with U.S. products, both in the international and domestic Canadian markets, would be jeopardized due to the lower transport cost component of the U.S. goods. Despite the potential negative impact of this hypothesis upon the economy, it is noteworthy that neither the Canadian government nor Canadian industry appeared concerned over the divergence of national transport policies until at least two years following U.S. rail deregulation.

In order to implement remedial legislation of nation-wide scope there are of necessity at least two elements which must come into play. Firstly, the existence of a problem of sufficient magnitude to warrant senior policy level attention; secondly, the awareness by government that such a problem exists. These two elements appear to be closely interrelated in their respective development. Thus, for example, the government would require industry to confirm that their market share is being reduced before addressing the problem legislatively. Similarly, industry pressure groups are more likely to give a matter

particular and ongoing attention once they know that the government is interested in studying a subject area involving regulatory reform.

It has already been mentioned in the Preface that CP Rail was the first industrial entity to alert the Canadian government in 1982 that a commercial problem of substantial magnitude was occurring to Canadian freight flows due to U.S. deregulation. The presidents of CP Rail and subsequently CN claimed, in correspondence with Canada's Minister of Transport, that their companies had lost 100 million dollars because of the lack of bi-national regulatory harmony and that such losses would continue until the Canadian government formally addressed this problem by modifying the national transportation policy.

The Minister of Transport responded to this call for legislative reform by instructing the Canadian Transport Commission in 1983 to conduct a public inquiry into the impact of U.S. deregulation upon Canadian railways and shippers. However, the CTC issued a preliminary report concluding that a) there was no major economic problem being experienced within the Canadian rail transportation industry, and b) to the extent that some market share had been lost by Canadian railways and shippers, the cause of such revenue attrition was not due to U.S. deregulation.

The purpose of Chapter 3 as well as the subsequent chapters in Part I is to examine whether the above regulatory agency's assessment was correct on either count or by contrast, whether Hypothesis I would prove to be valid. Therefore, evidence has been gathered in this chapter to test the following hypothesis:

Hypothesis I -That U.S. transport deregulation, by encouraging intramodal railway competition, would cause an attrition of trade and traffic revenues in Canada, as the cost-cutting and pro-competitive marketing practices characteristic of a less regulated environment in the U.S., would make Canadian transport services, the latter still constrained by price regulation, less desirable in the international marketplace.

In Chapter 3, it will be analyzed whether there occurred a significant loss of revenue to one Canadian railway, CP Rail, in the context of damage categories being attributed directly to U.S. deregulation.

The first source of data used in the examination and quantification of transborder freight diversion from Canadian railways subsequent to U.S. deregulation has been derived from CP Rail's internal commercial statistics. In 1982 approximately fifteen of the company's marketing managers located in different regions in North America and responsible for different commodities and equipment types were requested to give specific examples of the rail company's traffic loss which had occurred since

Staggers and their assessment of which other transportation company, if any, had benefitted from the changed routing patterns.

a) CASE OF LUMBER DIVERSION FROM BRITISH COLUMBIA ORIGINS TO NORTHEASTERN U.S. DESTINATIONS

The first specific example of transborder traffic diversion to be examined was that of construction lumber (kiln-dried spruce, pine, and Douglas fir) from British Columbia destined for Northeastern U.S. points. The origin "shippers" were Canadian sawmills in the interior of British Columbia which would sell their timber in standard specifications, either directly or through brokers, to lumber distributors located in the U.S. Northeast for subsequent sale to U.S. retail outlets, building contractors or smaller wholesalers. Once this sawn timber often was made available for transport at a British Columbia Railway (herein referred to as BCOL) rail siding in the Northern part of the province, it would then customarily move to Vancouver, where CP Rail would interchange the freight from the BCOL and then haul it across Canada to border storage and consolidation facilities called "lumber transfer yards" (herein referred to as LTY's) at Windsor or Welland, Ontario.¹⁵ From these LTY's, the timber would be transported, usually by truck, to the U.S. wholesale and retail distributors located within a three hundred mile radius.

Immediately subsequent to the enactment of Staggers in 1980, the Burlington Northern Railway started diverting a substantial amount of this lumber traffic from Vancouver through the United States (see Chart V), where it would then be interchanged with Conrail at Chicago, for furtherance to the same northeastern destinations in the U.S. Although the CP Rail marketing department had no hard evidence to prove the causality of this sudden diversion of traffic, worth millions of dollars in corporate transportation revenues, they suspected that it was largely due to the confidential rebate contracts which were allowed in the U.S. by virtue of the Staggers Act, but not in Canada where rate transparency was still obligatory.¹⁶

Chart XIV illustrates the routing options as between CP Rail and BN available to shippers. It was difficult for CP Rail to discover from their former customers the exact reason for the diversion, in part because these shippers expected the Canadian railway to compete in future years for the lumber traffic against the BN and therefore would not have revealed what the latter railway's pricing strategy had been. Secondly, if certain Canadian shippers had signed, with the BN, confidential contracts which contained rebates, they would not have wished to discuss this publicly as this could cause the nullification of their

CHART XIV

POST-STAGGERS LUMBER DIVERSION CP RAIL VS BN ROUTINGS



current contract if the confidentiality were breached as well as it having constituted a contravention of Section 381 of the Canadian Railway Act, which prohibited the offering or receiving of an unpublished rebate.

This example of transborder diversion demonstrates the many possible variables which could theoretically have influenced its causality. For example, whereas the U.S. construction industry and U.S.-Canadian currency trends could be scientifically measured, the amount of available BN equipment to service Canadian shippers rather than the majority of this railway's U.S. domestic customers, the margin of profit which BN could anticipate from undercutting specific CP Rail tariffs or the existing balance of eastbound vs westbound loaded equipment utilization on the BN system are critical commercial considerations which constitute alternate theoretical causes which by their nature are difficult to assess empirically, even if this confidential information were made available from the US. railway.

Between 1980-1984, CP Rail reported a loss in its B.C. lumber revenues of \$16.4 million due to this transborder diversion. Furthermore, in order to preserve its remaining B.C. lumber traffic, CP Rail had reduced certain freight tariffs by 10% - 18%, which caused the company an additional \$11.1 million revenue loss.

This second example of damages warrants some discussion, since under normal circumstances, the lowering of the price of a service due to a competitor's real or anticipated reduction should not be seen as constituting an unfair loss. However, CP Rail lobbyists used both examples of revenue attrition to draw the Canadian Government's attention to the inequity of competing against a U.S. carrier whose contractual price bids were lawfully secret, whereas all of CP Rail tariffs were required to be published and thus provided a transparent price target due to differing regulation. This would be analogous to participating in an auction where only one contender's bids were public.

b) CASE OF WOODPULP FROM WESTERN CANADIAN MILLS TO NORTHEASTERN U.S. DESTINATIONS

A second demonstration of transborder diversion involved woodpulp (cellulose) which originated in Western Canadian mills and was destined for paper processing and pharmaceutical product factories, as well as newspaper printing presses serving Northeastern U.S. cities, such as New York City and Philadelphia. This freight had traditionally moved by CP Rail "longhaul" from Vancouver across Canada to CP Rail's preferred Eastern border gateways, such as Windsor or Welland, Ontario. From

CHART XV

POST-STAGGERS WOODPULP DIVERSION CP RAIL LONGHAUL VS SHORTHAUL ROUTINGS



AZ - Arizona	KE - Kentucky	NE - Nebraska	RI - Rhode Island
CA - California	KS - Kansas	NH - New Hampshire	SD - South Dakota
CO - Colorado	MA - Massachusetts	NJ - New Jersey	UT - Utah
CT - Connecticut	MI - Michigan	NV - Nevada	VT - Vermont
IA - Iowa	MN - Minnesota	NY - New York	WA - Washington
ID - Idaho	MO - Missouri	OH - Ohio	WI - Wisconsin
IL - Illinois	MT - Montana	OR - Oregon	WV - West Virginia
IN - Indiana	ND - North Dakota	PA - Pennsylvania	WY - Wyoming

these border points, the railcars containing woodpulp would be interchanged with Conrail, which delivered the loaded rail equipment to their respective destinations in the U.S. Northeast.

From 1980, many Canadian woodpulp shippers started redirecting the CP Rail routing across one of CP Rail's Western gateways, such as Portal, North Dakota, where the merchandise would be interchanged with the Soo Line and then at Chicago with Conrail to destination.¹⁷ Chart XV illustrates the prejudicial impact of this new routing on CP Rail's division of revenues for these joint movements, which was a direct function of the number of miles it hauled the merchandise.

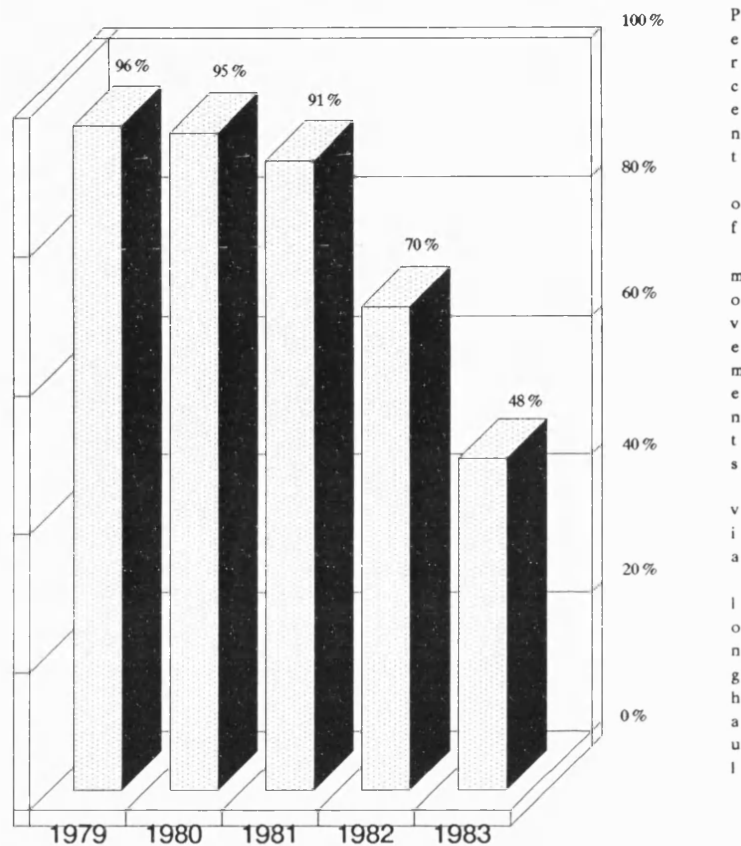
This type of routing redirection has already been referred to as "shorthauling", as it invariably results in a rail carrier retaining the traffic, but with a lessened extent of participation in the joint movement (due to reduced mileage).

The primary cause attributed to this second category of transborder diversion pertaining to woodpulp was the multiple routing cancellations by Conrail which were approved by the U.S. Interstate Commerce Commission subsequent to the enactment of Staggers.

In November 1981 and May 1982, Conrail cancelled several joint routes with Canadian railways, in accordance with the deregulatory provisions of the 1980 U.S. transport legislation, which provided the U.S. railways with a certain freedom to maximize their revenues through individual rail pricing actions. Since the divisional revenues which Conrail earned in transporting Western Canadian woodpulp from its Chicago interchange were greater than when initiating its haul from Welland or Windsor, Ontario (see Chart XV for mileage comparisons), Conrail chose to cancel many of the latter routings, thereby forcing the woodpulp movement to be transported over its remaining longhaul routes. However, the Canadian railways did not have the reciprocal statutory ability by virtue of their transport law to similarly cancel the remaining Canadian shorthaul routings in favour of their own longhaul ones.

Chart XVI clearly demonstrates the diminution from 1980-1983 of CP Rail's Western woodpulp movements over its Eastern Canadian (longhaul) gateways. During this period, CP Rail lost \$2.9 million in freight revenue from such diversion. Furthermore, in order to limit diversion by the BN directly from Vancouver (similar routing options at Chart XIV), CP Rail reduced its B.C.-originating woodpulp tariffs, which resulted in a further loss of \$1 million between 1982-1984.

CHART XVI
CP Rail woodpulp movements from
Western Canada to Northeastern U.S.A.



Source: CP Rail (1984)

c) CASE OF TRAFFIC ATTRITION ON OVERHEAD MOVEMENTS

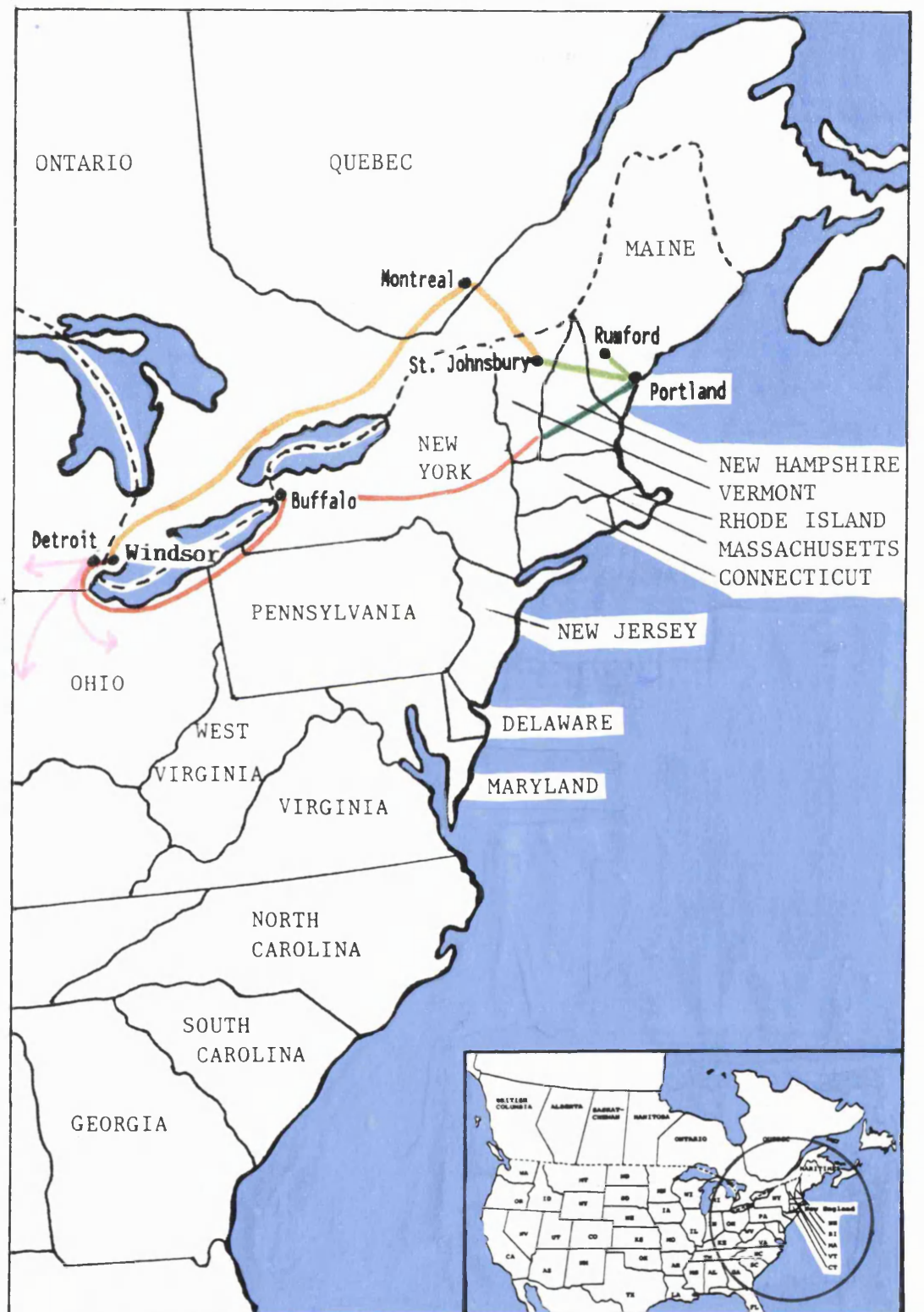
A third category of transborder traffic diversion involves what is customarily termed as overhead or bridge movements, i.e. U.S. origin to U.S. destination, with a part of the joint railway routing going through Canadian territory.

As can be seen from Charts XII (A) and (B), the geographical boundary between Canada and the U.S.A. does not constitute a straight horizontal line in the eastern quadrant. For instance, a part of the U.S. State of Maine juts in between the Canadian provinces of Quebec and New Brunswick (see location of McAdam, New Brunswick at Chart XII(B)); CP Rail's mainline was built to extend directly through the State of Maine connecting these two provinces in a non-circuitous fashion. Certain specialized paper products companies which are located in the State of Maine and whose customers were located in other parts of the U.S. had the option of routing their product by a semi-circular routing via a combination

CHART XVII

OVERHEAD MOVEMENT ATTRITION

TRADITIONAL CP ROUTE VERSUS ALL U.S. ROUTE



— Maine Central Railroad (MEC)
 — Boston & Maine (BM)
 — Delaware & Hudson (DH)
 — Canadian Pacific (CP Rail)

of smaller local U.S. railways or by a more direct routing via CP Rail. As the freight rates had been equalized prior to 1980, irrespective of which combination rail routing were selected, due to the U.S. collective ratemaking bureau mechanisms of which CP Rail and these local U.S. railways were members, the only differentiating criteria to determine routing had historically been transit time and availability of equipment.

Chart XVII provides a case in point regarding the International Paper Company, a rail shipper situated in Rumford, Maine, selling its products to several destinations in the Central and Western U.S.A. Prior to U.S. rail deregulation, this shipper had routed its freight from the Maine Central Railroad to St. Johnsbury, Vermont, where it was interchanged with CP Rail, which in turn carried the freight to the Windsor, Ontario/Detroit border gateway and then interchanged it with the U.S. destination rail carrier. The selection of this routing was made in part because the alternate all-U.S. routing involved greater delays caused by more interchanges due to the greater number of railways, and in part due to superior marketing and service by CP Rail.

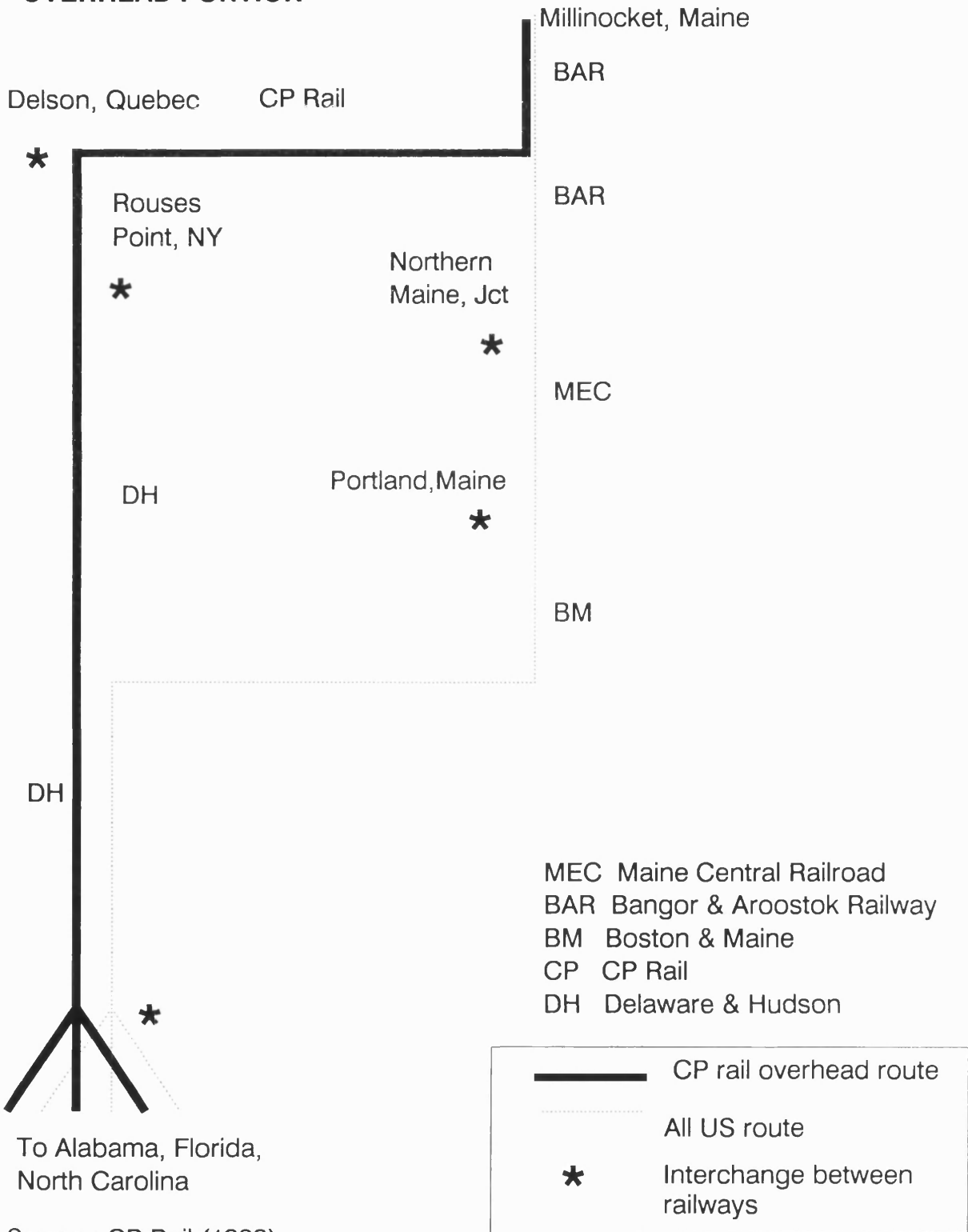
After U.S. deregulation, this Canadian overhead routing was generally replaced by the all-U.S. routing, in the instructions given by International Paper. For example, in 1982, CP Rail's revenue from International Paper was recorded on the overhead routing to have been \$1,729,336. In 1983, the CP Rail revenue had diminished to \$330,580. During that one year period, the number of carloads of fine paper which CP Rail had hauled for this shipper decreased from 1,771 in 1982, to 307 in 1983.

Another example of CP Rail revenue loss involving overhead traffic concerned movements of paper from Great Northern Paper Company, situated in Millinocket, Maine, to various destinations in the Southern U.S.A. Chart XVIII indicates the routing options which this shipper possessed. The overhead routing through the Province of Quebec, Canada (bold line routing) would include CP Rail, whereas the all-U.S. railway routing southward through the New England States (small dot routing) would not. Revenue attrition to CP Rail was recorded from this customer as being reduced from \$765,360 in 1982, to \$96,032 in 1983. Loaded carloads carried via the CP Rail overhead routing fell from 931 in 1982, to only 88 in 1983.

Similarly, another CP Rail customer, Madison Paper Company, whose mill was also located in the State of Maine, had in 1982 shipped 25,101 tons of woodpulp via the overhead routing involving CP Rail. In 1983, the tonnage had decreased to only 548 tons.

The principal cause of this third category of traffic diversion was attributed to certain differences

CHART XVIII: COMPARISON OF ROUTING OPTIONS BETWEEN U.S. TO U.S. MOVEMENT WITH AND WITHOUT CANADIAN OVERHEAD PORTION

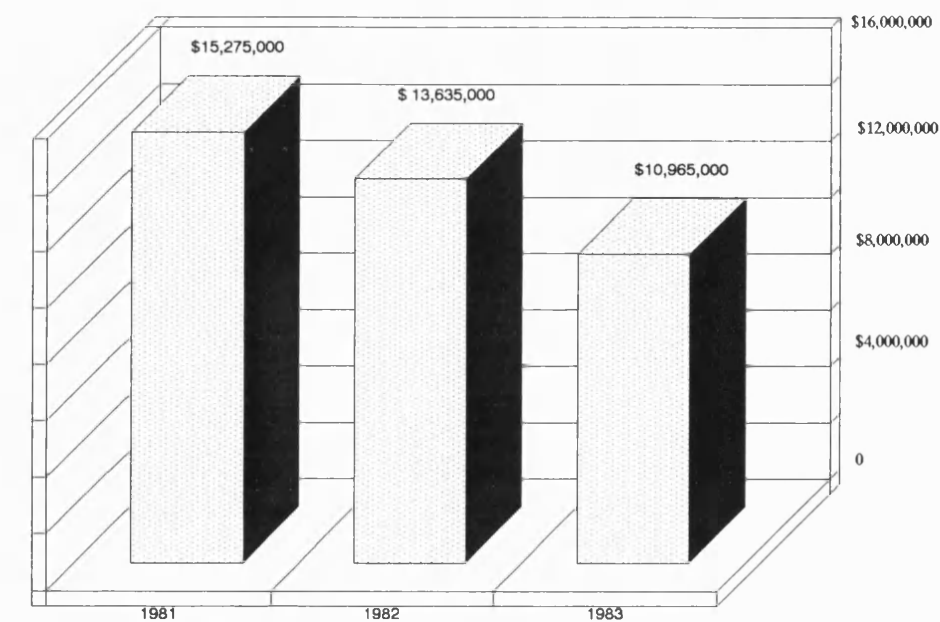


between the Canadian transport legislation and the new U.S. Staggers Act. Sections 275, 286, 287 and 381 of the Railway Act of Canada required that all freight rates relating to such overhead routings be filed publicly with the Canadian Transport Commission,¹⁸ whereas by contrast, Staggers allowed for rate confidentiality through railway-shipper contracts on the all-U.S. routings. Shippers, such as the three Maine paper companies mentioned above, were willing to incur some additional delays to service in order to obtain the secrecy which the U.S. legislation allowed, so that their freight rate agreements would not be known by their competitors.

For purposes of definition of basic railway terminology, the rates quoted on such transborder overhead movements were termed joint international through rates. Thus, in the Chart XVIII example, Great Northern Paper Company would have been quoted one rate even though at least three different railways (Bangor and Aroostok, CP Rail, and Delaware and Hudson Railway) were involved. This shipper would typically receive only one freight bill, the revenue of which would be shared between the railways according to their previously negotiated divisional agreements.

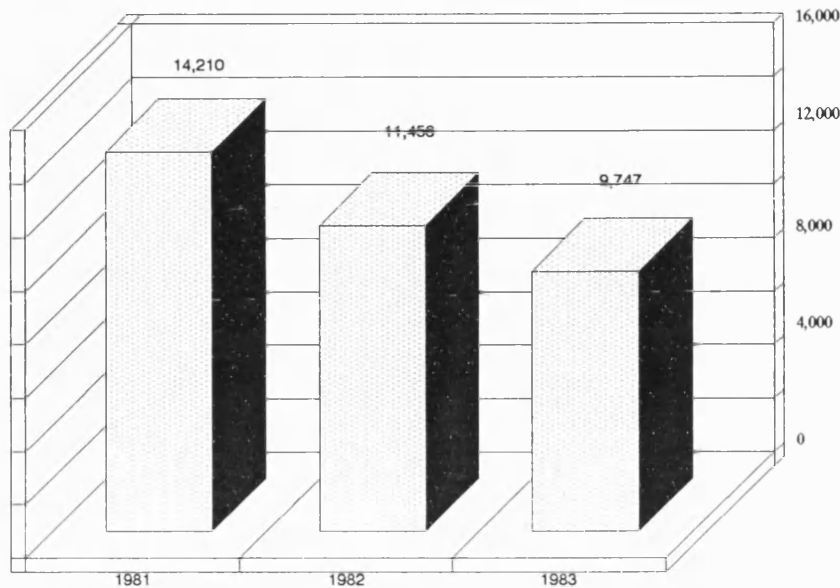
Charts XIX (a) and (b) further illustrate the substantial loss of revenue by CP Rail on its U.S. to U.S. freight movements with an overhead portion through Canada for paper and woodpulp products between 1981-1983.

**CHART XIX (a): CP Rail revenue on overhead
Traffic involving woodpulp and paper products**



Source: CP Rail (1983)

**CHART XIX(b): CP RAIL - CARLOADS ON OVERHEAD
TRAFFIC INVOLVING WOODPULP AND PAPER PRODUCTS**



Source: CP Rail (1983)

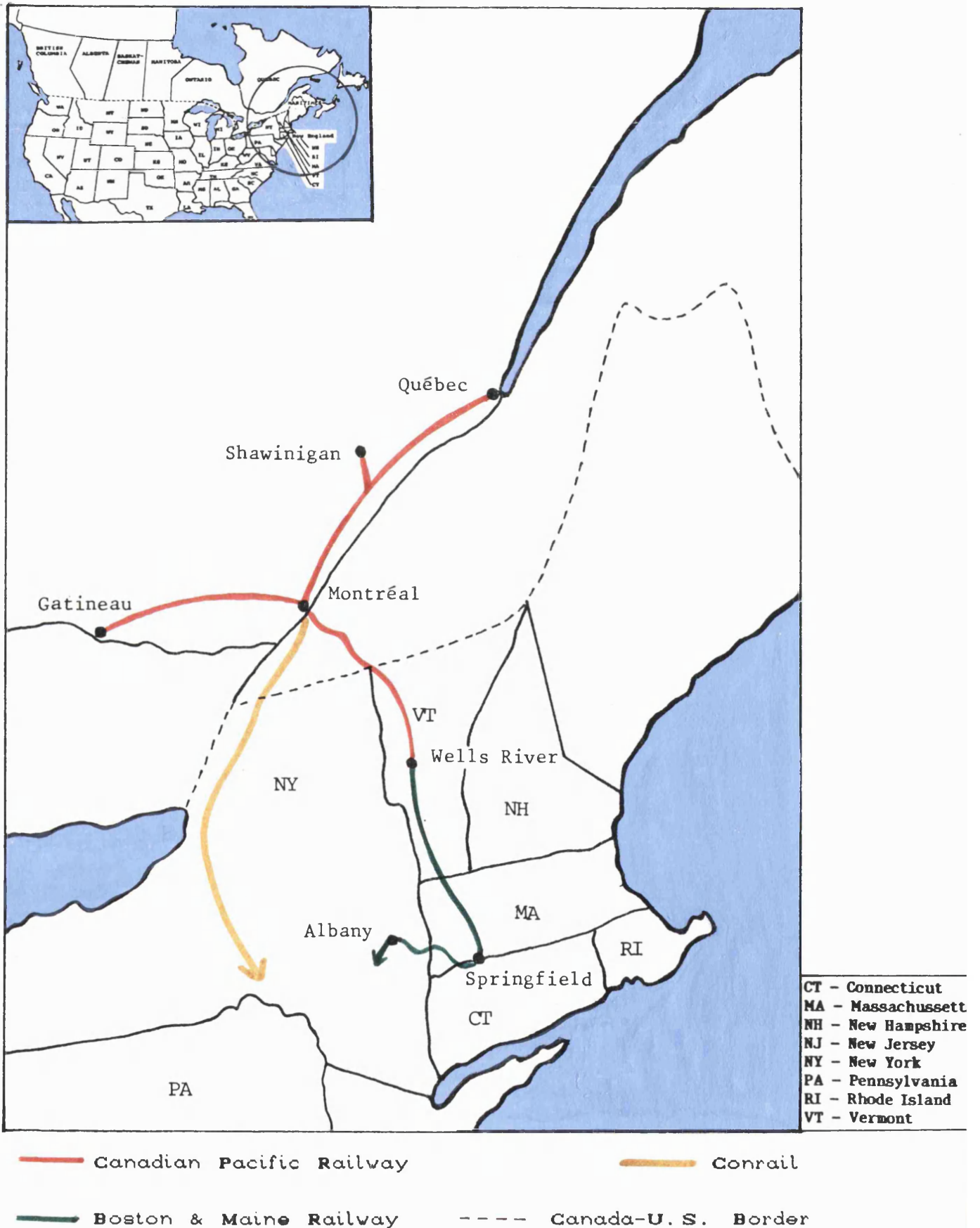
d) CASE OF QUEBEC NEWSPRINT PAPER DIVERSION FROM CP RAIL TO CONRAIL ROUTING

When one examines the revenue losses to CP Rail's overhead traffic as demonstrated in Charts XVII, XVIII and XIX (a) and (b) respectively and their possible explanation, a question which arises is whether these same losses could theoretically have been caused by concurrent factors other than U.S. deregulation. The following example demonstrates that as one CP Rail longhaul routing decreased, another U.S. carrier's longhaul routing increased proportionately. This test, if it could be applied to other situations involving traffic diversion, would appear to dispel the possible counter-theories that the cause(s) of such revenue attrition was instead a recession in the demand for the above-described commodities or that rail haulage, be it Canadian or U.S., was being displaced by the truck mode.

There are several producers of newsprint paper in the Province of Quebec situated on the CP Rail mainline, which supply the newspaper presses of the U.S. Northeast. Chart XX illustrates three such mills, Reed Paper (now Daishowa) at Quebec City, Consolidated Bathurst (now Stone Consolidated) at Shawinigan and Canadian International Paper at Gatineau. The CP Rail routing for these three mills which was generally selected prior to 1980, extended from these origins to Wells River, Vermont, where CP Rail would interchange with the Boston and Maine Railway to destination. One of the alternate routings which "shorthailed" CP Rail would have been evidenced by Conrail hauling the newsprint directly

CHART XX

ROUTING OPTIONS FOR QUEBEC NEWSPRINT TO U.S. NORTHEAST - CP RAIL LONGHAUL VS. CONRAIL



from Montreal southward.

As the newsprint movements all originated at CP Rail points, it was possible for company personnel to measure the number of loaded cars which went via the competing Conrail routing, since CP Rail would have been instructed by these shippers to interchange with Conrail at Montreal. Thus, as of April 1982, CP Rail had moved 183 cars on its preferred longhaul routing to Wells River, Vermont during the previous year. As of April 1983, the volume had decreased to 52 cars. Conversely, during the same two-year period, the CP Rail-Conrail routing had increased from 58 carloads to 116.

Although the above example demonstrates that the Conrail routing increased proportionately as the CP Rail longhaul routing diminished, it of course does not prove that this increase occurred because of U.S. rail deregulation. However, the Canadian railway industry perceived the cause as being directly related to Conrail's sudden ability, under the aegis of Staggers, to offer confidential contract rebates to the Quebec newsprint companies conditional upon the shippers' directing CP Rail to alter its preferred routing.

In 1982, a meeting of the traffic subcommittee of the Canadian Pulp and Paper Association was held, the primary purpose of which was to discuss a legal opinion from the firm of Aikens, McAuley and Thorvaldsen addressing the risks of Canadian paper companies' accepting U.S. rail rebates and the lack of any historical precedent or likelihood of the Canadian Transport Commission enforcing the anti-rebating provisions of the Canadian Railway Act. Despite requesting this legal opinion, none of these newsprint mills would admit during the meeting to accepting such rebates as this would have been illegal by virtue of Section 381 of the Railway Act of Canada. Therefore, it would have been virtually impossible to gather any specific evidence in order to corroborate the above theory of causality regarding routing diversion.

Conclusions

This chapter was intended to examine a part of Hypothesis I, ie. whether U.S. rail deregulation would likely cause an attrition of Canadian railway revenues, based upon the logical premise that North American companies, once given the choice, would select the lower priced services of deregulated U.S. railways.

Therefore, this chapter explored firstly whether there was serious revenue loss experienced by CP Rail following the enactment of the U.S. Staggers Rail Act of 1980. Secondly, it was intended to examine whether a most likely cause of this freight routing diversion was the sudden disharmony in

bi-national transport regulation between Canada and the U.S.A.

The first proposition was proven by the examples given of three different categories of transborder freight diversion which occurred shortly after U.S. deregulation, each involving a separate commodity and being attributed to a different causal feature within the post-1980 U.S. legislative changes. Thus, there can be little question that CP Rail lost its traditional western Canadian lumber market, as the BN captured and diverted much of this traffic from Vancouver to Chicago, where it would then be interchanged with Conrail to destinations in the northeastern U.S. Similarly, it is incontrovertible that CP Rail's customary longhaul routings for woodpulp between Alberta and Welland or Windsor, Ontario, were substantially eroded in favour of a less profitable gateway at Portal, where a competing U.S. railway would instead benefit from increased transcontinental mileage through the U.S. to destination.

Finally, it cannot reasonably be doubted that the demand for transportation of paper products which CP Rail had historically moved "overhead" through Quebec from the U.S. State of Maine to U.S. destinations was being eliminated soon after Staggers was enacted, and being replaced by an all-U.S. routing.

These examples indicate that rail routing diversion was occurring in serious proportions after 1980 and that it applied to diverse Canadian regions and commodities.

The second proposition suggests that these events were not coincidental, but were all causally related to the legislative changes which characterized the newly deregulatory U.S. national transport policy. Thus, in the lumber example, it was suggested that the U.S. statutory ability to offer confidential rebates afforded the BN the marketing opportunity to underprice transparent Canadian railway tariffs and thereby persuade shippers to select a transcontinental routing from Vancouver using BN trackage. Similarly, in the woodpulp example, another legislative provision within the Staggers deregulatory framework, i.e. the freedom for U.S. railways to cancel less profitable routes, was deemed to be the most probable cause of CP Rail's being forced to obtain only a "shorthaul" over the Portal gateway, rather than its customary longhaul routing over Windsor or Welland. Lastly, the preference shown by U.S. paper manufacturers to avoid the traditional overhead routing across Canada was attributed to the newly divergent bi-national rail transport legislation, i.e. the U.S. statute permitting confidential transport prices and the Canadian law still requiring public tariff filing.

Chapter 3 represents only the first phase of testing the validity of Hypothesis I in that more examples of rail revenue attrition and, of equal importance, trade diversion of Canadian products are

required in order to reach a complete evaluation.

In Chapter 4, different categories of examples of revenue loss experienced by CP Rail immediately following the enactment of Staggers are examined in order to assess the validity of other facets of Hypothesis I.

END NOTES

15. *There are also several LTY's on the south side of the Canada/U.S. border within the U.S. Northeast (e.g., Sharon, Vermont), as well as within Quebec (e.g., Coaticook), similar to the ones at Windsor and Welland. Moreover, there exists a second rail routing from Vancouver through Canada, to these same Eastern LTY's, that being the CN Rail route. As will be seen further in the thesis, that second Canadian longhaul routing as well suffered considerable diversion due to post-1980 rate pricing actions of deregulated U.S. railways.*
16. *Section 10756 Staggers Act permitted confidential railway-shipper contracts, whereas Section 175 of the Railway Act of Canada required that all rates be published in tariff form.*
17. *As with the previous example involving lumber diversion, there exists another routing across Canada via CN, and as will be demonstrated subsequently, the latter was experiencing a similar "shorthauling" problem over its Western gateway at Emerson, Minnesota [see Chart XII (A)].*
18. *Sections 286 and 287 of the Railway Act of Canada compelled all railways involved in a joint international through movement, both Canadian and U.S., to file their tariffs pertaining to any "continuous movement" with the Canadian Transport Commission.*

CHAPTER 4:

EXAMINATION OF INCREASED INTRAMODAL U.S. RAIL COMPETITION AND ITS IMPACT UPON CANADIAN RAILWAY REVENUES: CP RAIL DATA

Introduction

One of the premises of Hypothesis I is that U.S. transport deregulation would encourage "intramodal rail competition" and result in "cost-cutting and pro-competitive marketing practises" among U.S. railways. This chapter is intended to test this facet of the Hypothesis, in a similar manner as another of its constituent components concerning "an attrition of traffic revenues in Canada" was examined in the preceding chapter. The logical basis in support of the contention that U.S. deregulation would produce the above competitive dynamics among U.S. railways is centered upon the assumption that the statutory prohibition of collective ratemaking combined with the disappearance of a protective uniform (published) rate standard which all U.S. carriers were previously obliged to charge their customers would lead to active intramodal competition. As has been described in previous chapters, a portion of the customer base of U.S. railways included Canadian shippers and thus, these deregulated marketing strategies would predictably have an impact on transborder traffic flows.

This chapter will examine whether U.S. deregulation resulted in certain altered patterns of marketing and competitive behaviour among U.S. railways. These carriers had formerly been permitted to set rates collectively through several U.S. regional rate bureau mechanisms (see Chart XXII for geographic division of regional rate bureau "territories") which had been specifically exempted from the U.S. anti-trust laws by the provisions of the Reed-Bullwinkle Act of 1948, despite the railway members of each bureau being potential competitors on many routes. The practice of having a rail company's "single line rates" equalized to their joint line rates with rail connectors/competitors from the same origin to the same destination was prohibited as of 1980. Thus, a U.S. railway whose trackage on one route extended

between New York City and Chicago could no longer discuss the pricing of its services with a connecting railway on another route between the same cities wherein each carrier's trackage extended part of the way.

As the Staggers Act phased out the anti-trust immunity which between 1980-1984 had previously characterized these U.S. rate bureau, U.S. railways ceased many of the remaining collective and co-operative rate-setting practices which had enabled bureau members to participate in joint through movements at equalized prices and obtain historically accepted rate divisions for their portion of these routings. Under the newly deregulated environment, U.S. railways would offer lower rates to shippers if their line were used for the longest possible mileage, rather than equalize rates between same origin and same destination irrespective of the routings selected.

This chapter also evaluates the consequences of the more competitive environment which evolved among U.S. railways subsequent to U.S. deregulation with respect to its impact upon the revenues of CP Rail.

a) CASE OF FLORIDA AND LOUISIANA CITRUS JUICE ROUTING DIVERSION

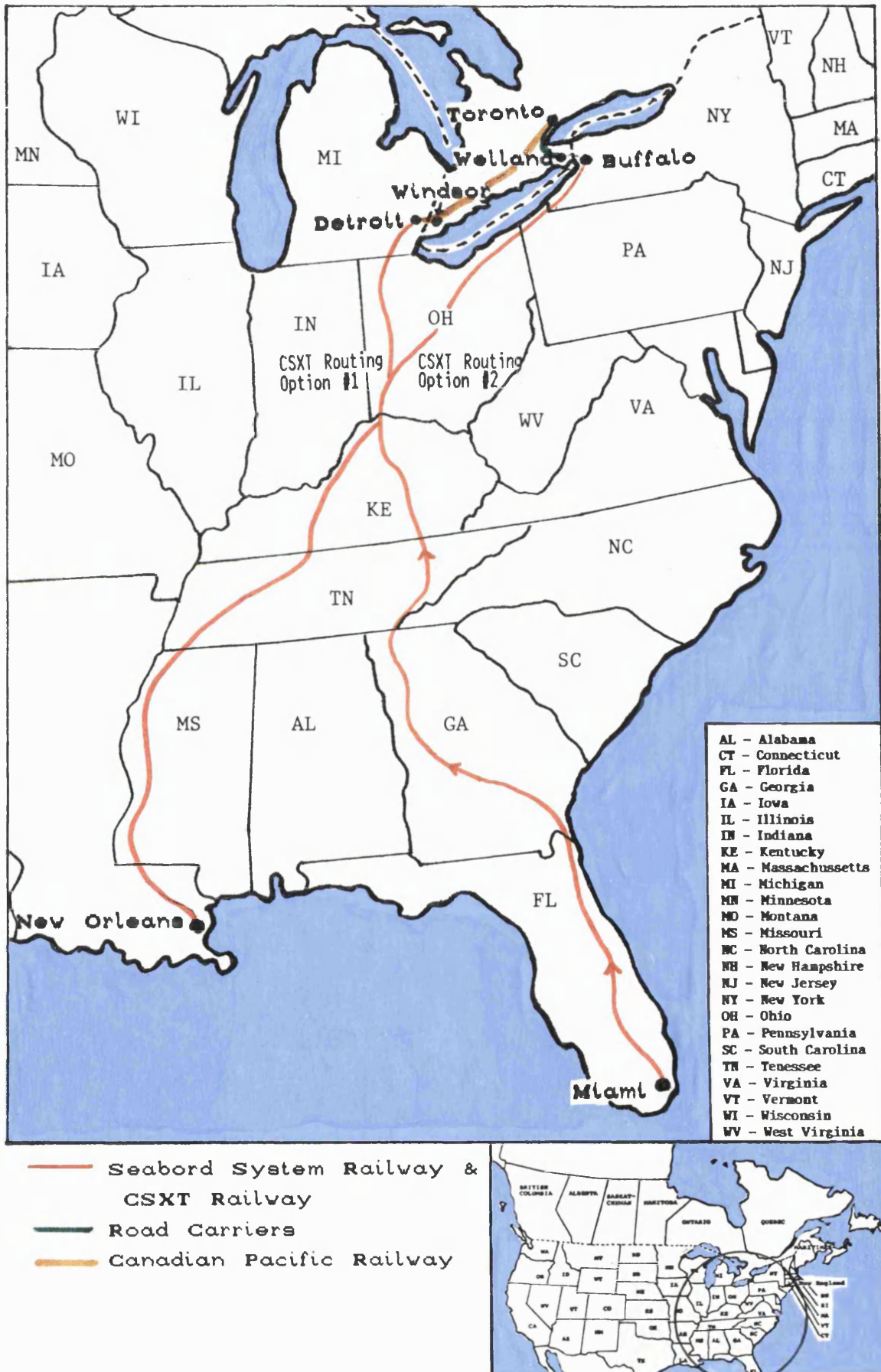
A first example of the sudden change in U.S. intramodal competitive behaviour which caused diversion of traffic away from CP Rail is found at Chart XXI.

Prior to Staggers, citrus juice from various origins in the States of Florida (ex. Miami) and Louisiana (ex. New Orleans), such as the Citrus Central Company located in Harvey, Florida and the Lykes Pasco Packaging Company in Dade City, Florida (both in close proximity to Miami) destined for Libby's canning factory near Toronto, Ontario had customarily been routed from the Seaboard System Railway to the CSXT Railway and then interchanged with CP Rail at the Windsor/Detroit border gateway to destination (see CSXT Routing Option #1 on Chart).

The CSXT Railway in July, 1982 offered the citrus shippers a 10 per cwt (100 pound equivalent) lower rate if an alternate routing would be selected so as to give it a longer haul through the U.S. to the Welland/Buffalo border gateway where the citrus juice would then be trucked to destination (see CSXT Routing Option #2). This differential pricing would not have been tolerated under the previous regime of U.S. rate bureau ratemaking practices which had equalized all rail rates from one North American region to another, irrespective of how many routing options existed or how many rail carriers participated

CHART XXI

DIFFERENT ROUTING OPTIONS FOR TRANSPORT OF U.S. CITRUS JUICE TO ONTARIO



in a given movement. In other words, these shippers would have previously paid the identical rate, regardless of which specific routing were chosen. In this Florida citrus juice example, a decline of \$92,000 in CP Rail revenue was recorded, since CSXT's rate through Welland/Buffalo resulted in a loss of 150 carloads which had been routed via the CSXT-CP Rail routing over the Windsor/Detroit gateway during the previous year.

It could be theoretically argued that U.S. railways such as the CSXT would have inevitably broken with the cooperative pricing custom established by the rate bureau, even if the Staggers Act had not phased out such collective ratemaking practices between 1980-1984. If one accepts this theorem, one could not then logically conclude that U.S. rail deregulation constituted the cause of the above case of transborder traffic diversion.

b) GREATER COMPETITIVENESS IN U.S. RAILWAY PRICING STRATEGIES - CASES OF SODIUM CHLORATE, SYNTHETIC PLASTICS, POTASH AND SCRAP METAL

Post - Staggers price competition from U.S. carriers on international movements often resulted in CP Rail's preserving the traffic, but at a lower rate. For example, subsequent to U.S. deregulation, Conrail reduced its freight rates on sodium chlorate from Beauharnois (shipper-PPG) and Valleyfield (shipper-Alby Chlorate), Quebec, points which were served directly by this railway, to various U.S. destinations. CP Rail was thus pressured to reduce its rates accordingly on this same commodity from nearby points on its own competing rail line, such as Magog (shipper-Quenord) and Buckingham (shipper-Albright and Wilson), Quebec. Competing Quebec plants of sodium chlorate at their respective location have been designated above in parentheses.

Had CP Rail not followed this pricing strategy, it is likely that the producers of this commodity at the points of origin local to the Canadian railway would have redirected the routing through interswitching (see Part II, end note 2) so as to give Conrail the longhaul, or alternately lost many of their own U.S. customer accounts (sodium chlorate is purchased by U.S. paper mills for the bleaching process) to competing producers which were "local" to Conrail. These Canadian rate reductions, which were thus intended to maintain CP Rail's sodium chlorate traffic, diminished the railway company's revenues by approximately \$100,000 during 1982-1983.

Similarly, CP Rail was required in 1982 to reduce its rates on synthetic plastics for a Canadian

rail overhead movement from the Hercules Company in Texas to a destination in the State of Massachusetts, in order to match the competitive rate-cutting by a combination of U.S. carriers including Southern Pacific, Missouri Pacific, Conrail and the Boston and Maine Railway whose joint routing did not go through Canada. Both the all-U.S. routing and the CP overhead routing are compared in Chart XXII. Revenue attrition to CP Rail was recorded as being approximately \$120,000 from this rate reduction.¹⁹

A further example of transborder diversion caused indirectly by the elimination of collective ratemaking among U.S. railways by the Staggers Act and the initiatives by U.S. carriers toward intramodal price competition, involved the BN reducing their freight rates on potash from points in close proximity to the Canada-U.S. border, thereby encouraging potash shippers from the Province of Saskatchewan to truck the product from their mines southward across the border to the BN railhead at Minot, North Dakota (see Chart V) rather than use the Canadian railways for a Canadian longhaul rail routing from the origin mine. International Minerals and Chemicals Company (IMC) was the first to divert its product via this multi-modal strategy.²⁰ As a consequence of this heightened price competition from U.S. railways, the CP Rail transportation share of Saskatchewan potash destined for the States of Alabama and Delaware was reduced from an estimated 50% prior to 1982 to 15% in 1983. In 1981, this subsequently lost potash traffic had provided CP Rail with revenues of approximately \$3 million.

BN was also able to divert an estimated \$1 million of freight revenue away from CP Rail by offering rate reductions to Ipsco, a steel producer situated in Regina, Saskatchewan on scrap metal traffic from origins in the States of Minnesota and North Dakota respectively, destined to Regina.

The above four examples, two of CP Rail traffic preserved but at reduced earnings, and two of traffic lost are cited as indirect results of the Staggers Act, which encouraged price competition among U.S. railways as a domestic U.S. national transport policy and which subsequently led to Canadian shippers' reformulating their routing options on transborder Canada/U.S. movements so as to benefit from the U.S. rate reductions.

As shall be examined in Part II, the manifestation of this U.S. transport industry experience may have subsequently encouraged certain Canadian shippers to put pressure on their own government to change the transport legislation with the objective that Canadian railways would one day exhibit these same characteristics of intramodal rail price competition on both Canadian transborder and domestic movements.

CHART XXII

ALTERNATE ROUTINGS FOR SYNTHETIC PLASTICS MOVEMENT



Combination U.S. Rail and CP Overhead Routing

All U.S. Route

c) EXTRA-TERRITORIAL REACH OF THE U.S. ANTI-TRUST LAWS

The next example of revenue attrition which was absorbed by CP Rail may be interpreted to have been caused indirectly due to the deregulatory changes in U.S. rail legislation which occurred in 1980. As a consequence of certain pro-competitive provisions within the Staggers Act, which removed protection from the extra-territorial reach of the U.S. antitrust laws,²¹ CP Rail and CN were not permitted in law to collectively set rates on the Canadian portion of movements originating in Canada and destined to the United States. In other words, the Staggers Act revoked the anti-trust protection which U.S. railways had required in order to price their services within a collective structure. The U.S. Courts interpreted the anti-trust legislation, now applicable to the rail transport sector, to inculcate any carrier whose collusive actions had "an effect" upon the price paid by any U.S. consumer. Thus, CP Rail and CN, by collectively setting rates from Canada to the U.S. were "affecting" the price paid by U.S. shippers and consignees. This joint CP Rail-CN fear of U.S. anti-trust extra territorial exposure resulted in voluntary intramodal Canadian rail competition only on southward U.S. destined traffic originating in Canada, while both Canadian railway companies continued to set rates collectively on northward Canada destined U.S. originating, and on overseas as well as all domestic traffic. This unprecedented dichotomy was, in itself, indicative of the disharmony and instability in Canadian carrier marketing policies which derived from the sudden divergence between the railway laws of both countries.

Subsequent to the above-described policy of selective intramodal competition being implemented by both Canadian railways in 1982, CP Rail lost newsprint paper traffic to Canadian National from the account of Reed Paper Company (now Daishowa Forest Products) located at Quebec City involving movements destined to some of the latter shipper's major customers situated in Detroit, Michigan and Sparta, Illinois respectively. CN had undercut the CP Rail tariff, which resulted in a loss of approximately 2,000 tons of paper transported per month which was no longer being routed via CP Rail. Revenue attrition of \$240,000 from this shipper was recorded as of July 1983.²²

This example is distinct from the ones previously cited in Chapters 3 and 4, in that it does not involve a rail routing through Canada being displaced by another through U.S. territory. Nonetheless, the price competition between the Canadian railways in the Reed Paper case would in all probability not have occurred had it not been for the change in U.S. railway legislation which resulted in the exposure of CP Rail and CN to the U.S. antitrust extra-territorial influence. Thus the Staggers Act was the indirect cause

of this CP Rail revenue attrition, even though from a macro-economic perspective, the Canadian economy had not been prejudiced, given that one Canadian railway had taken business away from another Canadian carrier.

d) REVENUE LOSS DUE TO DIFFERENCES IN REGIMES OF LIABILITY

Certain other cases of revenue attrition to CP Rail which resulted from the sudden divergence between U.S. and Canadian transport regulation, were difficult to assess monetarily by empirical measurement.

One such example attributed to the sudden differences in legislation, involved the claims for carrier reimbursement which could be made by shippers when merchandise was lost or damaged during a Canada/U.S. rail movement. Prior to the Staggers Act, both Canadian and U.S. railways were obliged to be jointly and severally liable for the full value of the freight carried by them for either domestic or transborder movements. A uniform bill of lading in identical format was customarily issued in both countries which standardized the statutory conditions surrounding the liability of all railways involved and which, for a transborder freight movement, required them to ensure the repayment of the full value of the merchandise as part of their respective common carrier's obligations.²³

In 1980 U.S. deregulation permitted U.S. railways to limit their liability contractually in exchange for rate concessions, while the Canadian statutory prohibition against privately limiting liability was still in effect. The U.S. legislation no longer required that a uniform bill of lading with full liability protection govern the U.S. portion of the rail movement. Thus, for example, on rail movements of fresh fruit and vegetables from California origins to Ontario destinations by refrigerated reefer trailer equipment, CP Rail would occasionally be sued as the "destination carrier" as was the consignee's statutory right, for the full value of the freight if the product arrived in a spoiled condition. However, when CP Rail personnel would request the origin U.S. rail carrier to pay for the latter's share of the claim (based upon proportion of mileage), assuming that there were no evidence as to either carrier's particular negligence, the U.S. railway would, after 1980, refuse the claim due to its having limited its own liability in conformity with the new U.S. legislation's rail contract provisions. CP Rail was therefore required by Canadian law to bear the residual economic burden of paying the entire claim, due to the U.S. railway's ability to extricate itself from liability in accordance with Staggers.

It was unfortunately not possible to precisely measure the amount of claims which CP Rail were obliged to pay for this category of revenue attrition due to the number of years it takes for such litigation in Canada to be finalized and court appeals exhausted.

e) U.S. EXEMPTION OF BOXCAR TRAFFIC FROM ECONOMIC REGULATIONS

Another example of revenue loss which CP Rail absorbed following U.S. deregulation, involved a specific type of rail equipment known as the boxcar. This equipment category was formally exempted from all U.S. economic regulation in 1983 (see also Part II, end note #78), following the determination of the U.S. Interstate Commerce Commission to the effect that this type of car generally carried commodities (such as paper products) which were inherently truck competitive and therefore which did not require regulatory intervention. The exemption of boxcar equipment from U.S. regulation suddenly enabled U.S. railways at destination points, which were obliged to store the empty rail equipment of originating carriers until the latter requested that it be returned to them, to charge a discretionary price for such storage. This U.S. deregulation of rail boxcar equipment significantly weakened CP Rail's bargaining position with U.S. connecting carriers since the Canadian railway was a net exporter of this type of equipment. The ratio of equipment imbalance was significant, in that CP Rail sent five loaded boxcars southbound in 1982 for every one loaded boxcar it received from U.S. origins. Thus, if connecting U.S. railways would charge CP Rail a fee of 35 cents per mile for the return of empty boxcars, the Canadian railway company would have had to pay an additional \$10 million dollars than during the years prior to U.S. deregulation. Therefore CP Rail was compelled to pay U.S. railways for the return of a substantial number of empty CP boxcars on a negotiated basis, without any recourse to a regulatory agency. This problem was exacerbated due to the 1983 equipment exemption, since CP Rail formerly would have been able to negotiate fees for the delivery and return of empty boxcars in conjunction with several other types of rail equipment under the previously permitted collective ratemaking procedures of the U.S. rate bureau.

f) INABILITY OF CANADIAN RAILWAYS TO PARTICIPATE IN JOINT BIDDING FOR TRANSBORDER CONTRACTS

Yet another case of revenue attrition derived from the inability of CP Rail to participate in the contractual negotiations on joint international movements which were permitted by the Staggers Act, due

to the Canadian law not permitting such confidential contracts. CP Rail marketing representatives expressed the view that had they been able to plan and bid jointly with their connecting U.S. railways, the rate and service proposals on international through movements involving a CP Rail component would have been more successful. For example, prior to the Staggers Act, CP Rail had combined with the CSXT Railway to transport certain models of finished automobiles and trucks for Ford Motor Company from its plant in Oakville, Ontario to dealerships in Louisville, Kentucky and Memphis, and Nashville, Tennessee, respectively. When U.S. deregulation occurred, differential pricing in the form of competing confidential contracts allowed Ford to select an alternate routing via the Grand Trunk Western Railway (hereinafter referred as GTW). CP Rail was unable legally to participate in the bidding and formulation of the CP-CSXT contract proposal, even though it depended upon the CSXT for its own share of the international routing. When the GTW proposal rather than the CSXT one was chosen by Ford Motor Company, CP Rail experienced a revenue loss of \$227, 170 per month (272 bi-level or tri-level carloads).²⁴

Although this example of revenue attrition is based upon the unproven assumption that had CP Rail been able to participate in the transborder contract proposal, the above-described traffic would not have been lost, one cannot deny the negative impact upon the Canadian rail company of having its international routings exclusively determined by the marketing efforts of its U.S. connectors.

Conclusions

This chapter provided a synopsis of the generic difficulties experienced by CP Rail in maintaining its share of transborder freight revenues subsequent to the enactment of divergent U.S. rail legislation in 1980. As with Chapter 3, the objectives of this chapter were to examine whether a serious degree of revenue attrition was occurring and whether these losses were likely to have been caused by the bi-national regulatory disharmony and pro-competitive marketing practises of U.S. railways created by the provisions of the Staggers Act. The cases cited in this chapter are diverse and highlight the wide range of problems which CP Rail encountered following U.S. deregulation.

The differential pricing of its two routes by CSXT in the citrus juice example shows how Staggers affected the competitive behaviour of certain U.S. railways. Similarly, the encouragement by BN of a multimodal diversion of potash traffic away from a CP Rail origin in Saskatchewan demonstrated unprecedented non-collective marketing strategy by the U.S. railway which resulted in a changed traffic flow pattern.

By contrast, the exposure by CP Rail to the newly unregulated U.S. rail pricing actions pertaining to the storage of empty equipment in the boxcar case constitutes a problem of an entirely different nature. The common thread between this example and the residual liability loss which CP Rail incurred due to the differentiation in national treatment of bill of lading conditions is that in both cases, revenue attrition was being experienced by the Canadian railway and the sudden disharmony between the rail transportation policies of Canada and the U.S. appeared to be the likely cause. The problem of extraterritorial reach of the U.S. anti-trust laws is, in the same manner, completely distinct from the other cases of revenue attrition within Chapter 4, yet an integral part of the common theme of a serious loss being attributed to regulatory divergence and the continental impact of the pro-competitive U.S. transport legislation. Chapter 4 has therefore confirmed certain facets of Hypothesis I such as the "attrition of traffic revenues in Canada", which was previously discussed in Chapter 3, and corroborated certain new elements, such as the "pro-competitive marketing practises characteristic of a less regulated environment in the U.S."

The research which was conducted regarding the impact of U.S. deregulation upon CP Rail revealed that the company had experienced an aggregated loss of approximately \$35 million between 1981-1983, subsequent to the sudden regulatory differences which the Staggers Act had produced as compared with the Canadian legislative status quo.

This loss figure must be qualified immediately. Firstly, it does not represent the loss of profit to the company, but rather the loss of revenue. As can be seen from the above Ford Motor Company example, although CP Rail was no longer receiving the \$227,170 per month due to the GTW diversion, it equally was not incurring the variable costs related to those movements (fuel, crew, equipment usage).²⁵ As it is not the intention of this thesis to address the methodologies of railway costing, suffice it to state that a significant percentage of the Ford revenue lost was offset by the fact that CP Rail did not absorb many of the related expenses.

Secondly, some of the revenue which was reported to have been lost to CP Rail due to transborder diversion in fact benefitted its U.S. subsidiary, the Soo Line. For example, Chart XXIII illustrates a case of traffic diversion wherein CP Rail was shorthauled due to Conrail's differential ability, by virtue of Staggers, to offer confidential rebates on its preferred routings. This chart describes what transpired in the movement of a petroleum product, known as carbon black, (used for the coloration of tires) which originated near Calgary, Alberta and was destined to New York City and Philadelphia, respectively. After U.S. deregulation, when Conrail offered price incentives for the shipper to route over the Portal,

CHART XXIII

TRANSBORDER ROUTING ALTERNATIVES FOR THE MOVEMENT OF CANADIAN CARBON BLACK



Saskatchewan gateway rather than the customary Welland, Ontario gateway, CP Rail lost approximately \$2,700 per loaded rail car. However, a part of that revenue was gained by the Soo Line, which transported the product between Portal and Chicago, prior to interchanging with Conrail.²⁶

In considering the above two factors, one could logically arrive at the conclusion that CP Rail had suffered only a portion of the reported \$35 million gross revenue loss which it had attributed to the changes in U.S. rail regulatory legislation between 1981-83. Furthermore, as CP Rail had reported net annual profits of \$100-\$200 million within this same time-frame, detractors of the above examples of revenue attrition might question how serious indeed were these losses to CP Rail's commercial viability. In other words, was the intervention of the Canadian government truly required?

However, the following arguments could equally be raised so as to justify the need for remedial transport legislation being proposed by Parliament.

Firstly, were these examples of transborder diversion not likely to repeat themselves, unless Canadian Parliament intervened to address and rectify the problem of U.S. railways' having the freedom to cancel routes and to offer secret rebates, while Canadian railways were still legally tied to the more regulated status quo? Secondly, even if only a part of these reported losses to CP Rail were in fact caused by U.S. deregulation, should not the policy objectives of the Canadian government have been to correct legislation which was unfairly stifling any profitability of Canadian railways? For example, even if CP Rail had lost only a "few" million dollars because its overhead traffic rates were transparent or its statutory liability could not be limited, were these problems not worthy of Canadian legislative rectification? Lastly, was it not the role of the Canadian government to protect Canadian carriers against preferential U.S. statutory rules which allowed their country's carriers to divert transport revenues and employment away from its own industries? In order to further develop the analysis of the significance of the attrition of traffic revenues in Canada pursuant to U.S. transport deregulation, the next chapter will test this aspect of Hypothesis I in relation to information drawn from the other member of Canada's rail duopoly, Canadian National Railway.

END NOTES

19. *This example of CP Rail revenue attrition could also have been due, in part or in whole, to the sudden availability of rate confidentiality for the all-U.S. routing [see Chapter 3(c)].*
20. *During my interview with Mr. V. Haan, Transportation Manager for International Minerals and Chemicals, which occurred in January, 1988 in Louisville, Kentucky, he stated that once the Canadian railways realized that such a truck/rail combination movement was operationally feasible, they reduced the freight rates to all of IMC's Saskatchewan competitors (such as Kalium, Potash Corporation of Saskatchewan, Potash Corporation of America) so as to avert similar diversion.*
21. *This doctrine of extra-territoriality has been applied in United States v. Aluminum Co. of America, 148 F.2d 416 (2nd CIR. 1945), United States v. Watchmakers of Switzerland Information Center Inc. (1963) Trade Cas. 77, 414 (S.D.N.Y.), modified (1965) Trade Cas. 80, 490 Re Uranium Antitrust Litigation, Westinghouse Electric Corp. v. Rio Algom Ltd. 480 F. Supp 1138 (N.D. 111 1979).*
22. *The pricing rationale of CN in this instance was rendered more complex due to the fact that these all-rail routings could be substituted for multi-modal routing options wherein shipping lines operating across the Great Lakes could participate. CN was alleged to have underpriced CP Rail's tariff in anticipated reaction to the lowering of the above "water competitive" through rates.*
23. *The statutory authorities in Canada, CTC General Orders T-5 (C.R.C., 1978 c. 1218) and T-43 (C.R.C. 1978, c. 1206) and in the U.S. the Carmack Amendment (Hepburn Act, 1906 c. 1391 Stat. 593) and the Cummins Amendment (1915, 38 Stat. 1196 and 1916 c. 301).*
24. *Due to the uncertainty surrounding this loss of Ford southbound traffic, CP Rail reduced its rate on northbound vehicle parts movements into the Oakville plant by eliminating a terminal charge of \$150 per vehicle. This rate reduction caused revenue attrition in 1983 of a further \$814,238 as compared with the previous year.*
25. *It has often been stated that in the North American railway industry, the variable to fixed cost ratio is 70/30. Inevitably the difficulty arises concerning the length of time within which one determines the variable cost. In the Ford example, how long theoretically would CP Rail have continued to maintain the equipment and the crew, even though this traffic had been lost, in anticipation of future business?*
26. *Furthermore, the division of revenues on any joint movement between CP Rail and the Soo Line gave the parent railway a weighted advantage of several percentage points disproportionate to the actual mileage carried according to the 1944 CP/Soo Traffic Agreement; interview with Mr. D. Cavanagh, CEO and Mr. W. Serkland V.P. Law, the Soo Line in Minneapolis, Minnesota, January 1988.*

CHAPTER 5:

QUANTIFICATION OF TRANSBORDER FREIGHT DIVERSION FROM CANADIAN RAILWAYS SUBSEQUENT TO UNITED STATES DEREGULATION: CANADIAN NATIONAL RAILWAY DATA

Introduction

The objective of this chapter is to examine whether Canada's other transcontinental railroad, Canadian National (hereinafter referred to as CN), suffered serious economic harm during the period 1980-1984 and that the cause of this revenue attrition was likely to have been the sudden divergence of bi-national transport regulatory policy. As CN's infrastructure, although more extensive, parallels the trackage of CP Rail on a more northerly plane across Canada, it would have been reasonable to predict that the former would be subject to similar categories of traffic diversion as were documented in the previous two chapters. If CN would be found to have experienced an equally significant degree of revenue loss following U.S. deregulation, despite a completely distinct set of customers and rail border crossing points, the cause of such attrition would then appear to be more generic in nature and one warranting a public policy solution.

The assessment of CN's commercial experience following U.S. deregulation is thus intended to form part of the examination of the first hypothesis which was outlined in Chapter 1:

Hypothesis I -That U.S. transport deregulation, by encouraging intramodal rail competition would likely cause an attrition of trade and traffic revenues in Canada, as the predictable cost-cutting and pro-competitive marketing practises, characteristic of a less regulated environment in the U.S., would make Canadian products and transport services, the latter still constrained by price regulation, less desirable in the international marketplace.

It should also shed further light upon one of the sub-themes of the thesis, that the change in the regulatory structure of one country's transportation dynamics predictably has a significant impact upon the industrial sector of that country's trading partner.

The source of the CN data is derived from the submissions of the company to the above-described public hearings of the Rail Transport Committee of the Canadian Transport Commission, which were initiated by the Minister of Transport at the joint request for governmental intervention by CP Rail and CN in 1983.

Mr. J. Sturgess, CN's vice-president of marketing, testified at the 1984 Canadian Transport Commission inquiry that approximately 25% of the company's average annual rail revenue of \$700-\$800 million was traditionally derived from Canada-U.S. international movements.²⁷ This provides an approximate degree of magnitude of the possible impact upon CN of the divergence between Canadian and U.S. railway regulation which had occurred with the enactment of the Staggers Act in 1980.²⁸

Due to the company's concern for strict market confidentiality, the measurement of revenue attrition by CN was purposefully not accompanied in the evidence presented to the CTC by the precise origin, destination, name of shipper or consignee so as to protect the possible identification of their customer base by competing carriers. Despite this obstacle to empirical measurement by third parties, the following examples and categories of losses were examined with the objective of testing in particular those facets of Hypothesis I which refer to the attrition of traffic revenues and the lessened desirability of Canadian transport services.

a) CASES OF PREFERRED ROUTE SHORTHaulING INVOLVING WOODPULP, LUMBER AND SULPHUR

For the year 1983, CN reported a decrease of 90,000 tons of woodpulp traffic, as well as of 120,000 tons (2,000 rail cars) of lumber traffic, due to its traditional routings being "shorthauled" by U.S. railways.

Similar to the cases cited above in Chapter 3 (a) and (b), where shippers whose mills were located at CP Rail origins in the western Canadian provinces of British Columbia and Alberta had suddenly requested the rail routing diversion of their forest products over the Portal, Saskatchewan/North Dakota gateway, thereby depriving CP Rail of its customary longhaul through Canada, other woodpulp and lumber shippers local to CN trackage similarly insisted upon a routing from a western Canadian CN origin to the nearest U.S. gateway border point on CN trackage, which is Duluth, Minnesota [see Chart XII(A)]. This

transborder diversion which ended the preferred longhaul routing by CN from western Canadian origins to a border point crossing at either Detroit, Michigan or Buffalo, New York for furtherance by a U.S. railway to destinations in the northeastern U.S., was held to account for a revenue loss to the company of \$3.8 million for woodpulp and \$6.8 million for lumber in 1983.

CN also reported a loss of approximately \$25 million due to the curtailment of its longhaul movements of sulphur from the Province of Alberta to the United States, for the three-year period between the third quarter of 1981 and September of 1984. Mr. Sturgess stated in his testimony before the Canadian Transport Commission that this loss was due, in CN management's view, to confidential contract rebates having recently been permitted in the U.S. and being used to divert international traffic formerly carried by Canadian railways, whose pricing decisions were rendered ineffective due to the obligatory tariff publication transparency still required by the Railway Act of Canada.

b) CASE OF RENEGOTIATED DIVISIONAL ARRANGEMENTS DUE TO THREAT OF U.S. ROUTE CANCELLATION

Another category of revenue attrition likely to have been attributed to U.S. transport deregulation involved woodpulp traffic from western Canadian origins to eastern U.S. destinations, certain U.S. carriers, such as Conrail, had agreed to carry the freight over CN's preferred routing conditional upon the latter accepting a substantially reduced division of the joint revenue [see Chapter 2 (b)]. CN had in 1983 accepted this renegotiated divisional arrangement in order to preserve their longhaul routing on movements involving 110,000 tons of woodpulp. The resulting revenue loss was reported as \$550,000.

The linkage which CN established between this loss and the advent of U.S. deregulation was based upon the newly enacted freedom to cancel routings which was permitted by Staggers,²⁹ whereas in contrast Canadian railways were prohibited from similarly cancelling their own less profitable (shorter mileage) routings by virtue of Section 23 of the National Transportation Act, 1967. Thus, assuming theoretically that Conrail had two routings from a CN origin to a destination in the eastern U.S., similar to Charts XIII or XXIII, the U.S. railway would threaten to cancel the routing with the lesser mileage unless CN accepted a lower division of the total freight revenue. CN could not avail itself of a similar counter-strategy due to the difference in legislation.

c) COORDINATED PRICING STRATEGY WITH U.S. SUBSIDIARY ON OVERHEAD MOVEMENTS

Regarding overhead movements (from a U.S. origin to a U.S. destination through Canada), CN had not accepted the inevitability of this traffic's erosion due to competition from all-U.S. routings, as had CP Rail [see Chapter 3 (c)]. For example, printing paper traffic from the State of Maine to destinations in the U.S. midwest had customarily been routed through Canada from an origin U.S. carrier, such as the Boston and Maine Railway, interchanging with the CN at the Danville Junction, Quebec borderpoint, then via CN through the Provinces of Quebec and Ontario, thence to an interchange with CN's wholly-owned subsidiary, the Grand Trunk Western Railway (GTW) at Sarnia, Ontario borderpoint [see Chart XII (B)] for ultimate delivery to the U.S. destination. In order to offset the diversionary strategy of a competing combination of all U.S. carriers which could give the same shippers a completely confidential joint rate by virtue of Staggers (see Charts XVII and XXII for conceptual comparison), CN coordinated their pricing strategy for this paper traffic with their U.S. subsidiary, the GTW, so that the latter would offer shippers confidential contracts on behalf of both railways, which included rebates (totalling \$1,468,048). Evidence was also presented that in 1983, CN reduced its divisional revenues with certain origin U.S. carriers on 7,673 carloads of printing paper, so that CN and the GTW could retain this overhead traffic. This pricing strategy resulted in additional revenue attrition to CN of \$806,203.

These examples are surprising in that they constituted an admission that CN was contravening the existing Canadian legislative requirements in two distinct ways. First, CN was extending rebates indirectly to Canadian shippers by acting through the agency of its U.S. subsidiary, the Grand Trunk Western, contrary to Section 381 of the Railway Act of Canada which prohibited the giving of rebates. Secondly, it was not filing the actual international joint through rate with the Canadian Transport Commission in conformity with Sections 287 and 288 of the Railway Act of Canada, since the rebate component was confidential. Perhaps these extra-judicial admissions by CN's vice-president at the CTC public hearings were meant to demonstrate to the policy makers a seeming requirement for legislative contravention as long as there existed such incompatibility between the Canadian and U.S. regulatory regimes.

Similar examples were also given of CN having retained traffic by instructing another of its U.S. subsidiaries, the Central Vermont Railway (CV), to offer rebates on newsprint paper from Amos, Quebec

to Philadelphia, Pennsylvania and from Clermont, Quebec to Carlstadt, New Jersey, allegedly resulting in reduced earnings to the CN of \$300,750.³⁰

d) EXTRA-TERRITORIAL REACH OF U.S. ANTI-TRUST LAWS

Consistent with one of the categories of indirectly-caused revenue attrition which had been included in the above-described CP Rail examination of loss, CN management testified that the extra-territorial reach of the U.S. antitrust laws had also caused their company economic harm.³¹ It was estimated that the inability of CN to lawfully price in a collective manner with CP Rail on southbound sulphur movements from Canada to the U.S., due to the Staggers Act having eliminated the railway exemption from U.S. antitrust prosecution, had resulted in revenue attrition of approximately \$5 million for 1984. Simply put, if CN had been permitted to respect Canadian railway law (Section 279 of Railway Act of Canada) which allowed collective ratemaking, they would apparently never have engaged in price competition with CP Rail on these Canadian-originated sulphur movements to U.S. destinations. CN was thus alleging that this extra-territorial application of a U.S. law was infringing upon its ability to comply with one of the protectionist elements of the national transportation policy of Canada and was quantifying the "cost" of such enforced competition to their anticipated revenues.

Also similar to CP Rail's structural categorization of damages due to regulatory divergence, the CN testimony gave examples of revenue loss due to Conrail's route cancellation program at the CTC public inquiry, to which the company attributed a loss of \$8 million in annual revenue, as well as the imbalance of loaded versus unloaded boxcar traffic directional flows which had prejudiced CN's asset control due to the I.C.C. decision to exempt this equipment type from regulation [See Chapter 4 (e)]. As these headings of revenue attrition have already been documented in the previous chapters, it is not useful here to describe in detail these similar examples of economic loss encountered by another Canadian railway. The importance of such CN testimony lies in its confirming and widening the base of research pertaining to CP Rail's negative commercial experience immediately following U.S. deregulation.

Conclusions

There exist certain apparent weaknesses in both the derivative methodology as well as the interpretative designation of some of the examples of post-Staggers revenue attrition quantified by CN management. Firstly, due to the company's unwillingness to divulge the specific origins or names of

shipper customers which were subject to this transborder traffic erosion, it was not possible for those outside the company to verify the exactness and authenticity of the claims. Secondly, CN management's inclusion in the calculation of revenue loss, certain amounts which they attributed to intramodal competition appears to have been unempirically based, since these losses theoretically could have been derived from causes unrelated to U.S. deregulation. The existing Canadian transport policy construed collective pricing between railway companies in a permissive rather than an obligatory manner and therefore the assumption that CN and CP Rail would not have eventually entered into competition were it not for Staggers' causing the extra-territorial reach of the U.S. anti-trust laws, was not established with a sufficient degree of scientific rigour.

Nevertheless, the four headings of traffic diversion herein examined from CN data corroborate the assumptions to the effect that the loss of revenue by Canadian railways was of substantial magnitude and that this attrition was perceived by the Canadian transportation industry as having been caused by U.S. deregulation. There can be little doubt that from 1980-1984, CN experienced a serious diminution of its longhaul traffic flows involving forest and sulphur products from western Canada to U.S. destinations. Similarly, the evidence of CN's lower returns on interline revenue divisions both for Canada-U.S. as well as overhead movements cannot reasonably be put into question. These factual examples parallel and expand upon the previously described CP Rail economic experience. The sudden divergence of bi-national transport policy regarding the following elements of U.S. transport deregulation was uniformly identified by both CN and CP Rail as the primary cause of their respective losses:

- a)ability of U.S. railways to enter into confidential contracts
- b)ability to offer unpublished rebates
- c)freedom to cancel shorthaul routes
- d)ability to negotiate liability limitations
- e)ability to determine storage charges for empty boxcar equipment of other railways
- f)statutory prohibition against collective rate-making by potential rail competition

Therefore, this chapter has confirmed certain elements of Hypothesis I, i.e. that U.S. transport deregulation would likely cause an attrition of traffic revenues in Canada due to cost-cutting and pro-competitive marketing strategies of U.S. railways.

END NOTES

27. *Evidence of Canadian National Railway Company, dated September 24, 1984, to the Public Inquiry into effects of U.S. deregulation on Canadian railways and shippers pursuant to a request by the Minister of Transport under Section 48, National Transportation Act, 1967.*
28. *Indeed, this amount of CN revenue exposure would have been understated if Staggers, as contended, could be proven to have made certain U.S. shippers more competitive in their export markets and caused a proportionately lessened demand for competing Canadian products by domestic Canadian or overseas purchasers. For example, Fleetwood Corp. manufactures vacation trailers in two of its plants - one in Lindsay, Ontario, the other in Portland, Oregon. If the CN freight rates between Lindsay and Alberta markets were deemed excessive, this company would have its U.S. facility service the Western Canadian market.*
29. *In March 1983, the ICC (365 I.C.C. 753) allowed a large number of Conrail route cancellations in virtue of section 10705 (c). Interstate Commerce Act, 49 U.S.C. The Canadian railways unsuccessfully attempted to have the ICC suspend these cancellations (ICC Docket No. 38676).*
30. *Supra end note #27. These cases of revenue attrition were inconsistent with another CN argument made in the same public submission to the effect that the CTC should enforce Sections 287 and 288, the Railway Act of Canada against U.S. rail carriers (such as Conrail or BN) giving rebates in Canada. Mr. Sturgess testified that CN had discovered 330 contracts from or to Canada in the files of the Interstate Commerce Commission which contained evidence of rebates being given by U.S. railways. It never seemed to occur to CN management that they were incriminating both their U.S. subsidiaries, the GTW and the CV, as well as themselves by participating indirectly in similar rebate contracts.*
31. *Supra end note #27. See Chapter 4, (c) for elaboration of this same structural element from CP Rail's perspective.*

Chapter 6:

EXAMPLES OF REVENUE ATTRITION BASED UPON DIFFERENCES BETWEEN THE NATIONAL TRANSPORTATION POLICIES OF CANADA AND U.S. - SUBMISSIONS OF INDIVIDUAL SHIPPERS AND SHIPPERS' ASSOCIATIONS

Introduction

The only remaining element of Hypothesis I which has not yet been examined pertains to the dimension relating to "attrition of trade" and "Canadian products - less desirable in the international marketplace."

The objective of this chapter is therefore to analyze whether the Canadian railways were the only subject entities to experience a serious degree of economic harm following U.S. deregulation. In order to test the postulate that there developed a problem of trade diversion which was of sufficient magnitude to warrant Canadian government intervention, the categories of damage previously assessed for the Canadian railways should theoretically have been corroborated by the industrial users of the affected rail service. This chapter furnishes examples from Canadian shippers and shippers' associations in order to examine whether these manufacturers and processors of Canadian products suffered a measureable loss of revenue likely to have been caused due to the emergence of two alternative national transport policies where only one had existed previously.

These examples of revenue attrition by shipper interests are intended to evaluate whether a significant problem of transborder diversion was being experienced by both suppliers and users of rail transportation, as well as whether the competitiveness of Canadian products was being jeopardized with regard to domestic markets as well (the latter constituting a variant of Hypothesis I).

It should be noted however that there existed considerable reticence on the part of shippers and their associations to provide data quantifying the extent of harm which they attributed to the sudden

divergence between the national transportation policies of Canada and the U.S. The CTC inquiry officers identified this weakness in their 1983 Preliminary Report as justifying the conclusion that no remedial legislation was required to the existing Canadian transport regulation since the problem of transborder traffic diversion had in their view not been sufficiently detailed.

The lack of hard data being provided by shippers was instead the result of some of the following factors:

- 1.Many large Canadian producers were receiving rebates from deregulated U.S. railways dependent upon longhaul routing redirection. These shippers would not have wished to expose the possible illegality of their actions.
- 2.Shippers would not generally have been willing to elaborate before a public agency specific cases of revenue attrition, the divulcation of which could enhance their competitors' strategic planning.
- 3.There existed among shippers the widely-held belief that any legislative amendments to the Canadian transportation policy would likely favour the railways.
- 4.The investment required to empirically prove prejudice to a Canadian manufacturer's traffic base caused by the influence of U.S. deregulation was generally not deemed to be warranted, due to the effectiveness of the Canadian Transport Commission as a meaningful advisory force to the Minister of Transport being questioned by shippers.

Whereas the greater thrust of many shipper lobbying efforts involved their respective recommendations for an appropriate Canadian public policy solution (Hypotheses II, III and IV), rather than the analysis or quantification of the problem, this chapter addresses only the latter subject.

a) INDUSMIN LIMITED

One Canadian shipper which claimed to have been prejudiced by the sudden divergence in bi-national transport policy was a silica sand company, Indusmin Ltd., headquartered in Toronto, Ontario. Indusmin owned mines of Precambrian quartzite in the Provinces of Quebec and Ontario and, according to its president, Mr. Woodruff, who presented evidence to the CTC in August, 1983, the management had recognized from the outset of their operation that the company would have to contend with higher production costs than their principal U.S. competitor, which was situated in the State of Illinois. The reason for this was that Indusmin was obliged to mine the hard rock and then crush it into the silica sand required for glass and fiberglass making, while their midwestern U.S. competitor owned a sand deposit

already in granular form and apparently free from significant impurity levels. Despite these higher production costs, the company, prior to the enactment of the Staggers legislation, had maintained an overall price advantage over the U.S. competition to certain Canadian destinations, given the greater proximity of the latter markets to Indusmin's mines.

Due to the low value per ton of the sand, transportation costs constituted a very important component in the delivered price. For example, one of Indusmin's silica mines was located at St. Canut, Quebec and in 1982 it sold approximately 4,500 tons to a glass fabricating customer in Shawinigan Falls, Quebec at a delivered price of Can\$35 per ton, which included the published Canadian freight rate of \$10 per ton. Although Indusmin's competitor in the State of Illinois could sell its sand at the lower price of US\$6.50 (Can\$9.00) per ton, the published freight rate from the U.S. origin to Shawinigan Falls was US\$31.94 (Can\$34.00). Thus, Indusmin had held an overall price advantage of approximately \$8.00 per ton (the difference between \$35 and \$43 delivered cost).

However, this price differential was reduced sharply in 1983 when the U.S. railway serving the Illinois competitor offered confidential contract rebates which had the effect of undercutting the overall price advantage of Indusmin's product. The objections which this company formulated to the CTC against this rebating practise focused not upon the fact that Indusmin was losing its Shawinigan Falls' market, but rather that this occurrence was made possible because of the unprecedented divergence between Canadian railway law, which required Indusmin's freight rates to be published, and U.S. railway law which allowed confidential rebates.

Thus, Indusmin's silica rate appears to have constituted a transparent target which the Illinois competitor could, with the cooperation of its U.S. rail carrier, undercut. However, the U.S. freight rate could not be conversely uncovered by Indusmin due to the confidentiality permitted under Staggers. The company claimed as well that the U.S. railway was contravening Sections 287 and 381 of the Canadian railway legislation by offering a secret (i.e. unpublished) rebate to a Canadian consignee. These provisions of the Canadian law required that all international freight charges be filed at the CTC.

It was submitted that Indusmin had similarly lost approximately 25% of the demand for its production from its Midland, Ontario mine when a competing U.S. silica supplier had been able to divert one of Indusmin's major Canadian customers through the offering of a confidential U.S. rail contract.

Although the loss of these Canadian markets by Indusmin may theoretically have been caused by a variety of other factors, such as the desire of its glass customers to stabilize their supply by adopting a

strategy of using more than one producer, it was the view of the company that the primary cause was the change in U.S. legislation. Irrespective of specific causality, Canadian transport policy makers were being alerted to the serious macro-economic consequences of Canadian jobs potentially being jeopardized and perhaps forfeited to U.S. companies.

b) CANTERRA ENERGY LIMITED

Another problem which was addressed by several Canadian origin shippers involved the loss of their traditional control over transborder routing due to confidential contracts being given to U.S. consignees. An example of a Canadian company subjected to this category of loss was Canterra Energy Limited, headquartered in Calgary, Alberta, a major producer of liquid sulphur. During an interview with Messrs. J. Regehr and D. Kanten, Canterra's distribution managers, it was explained that the company's sulphur, produced in Alberta, was regularly purchased by fertilizer manufacturers in the State of Florida. Canterra's competitors for this market included such diverse sources as other sulphur producers from the Province of Alberta, refineries from the U.S. east coast and Texas which extracted SO₂ from their oil and gas products (in order for the latter to conform to pollution regulations) and U.S. salt mines which extracted liquid sulphur as a by-product of the "Frash method".³²

In its testimony to the Canadian Transport Commission's public inquiry into the impact of U.S. deregulation in October 1983, the company submitted that since Staggers, its shipments of sulphur were suddenly being routed according to the directives of the U.S. purchasers at destination, which were legally entitled since 1980 to receive rebate contracts from U.S. intermediate and destination railways. Canterra claimed to have been disadvantaged by the above practise in two distinct ways. Firstly, much of their liquid sulphur shipments were transported in 166 company-owned rail tank cars and thus the most efficient utilization of their equipment was being diminished by the selection of circuitous routings by U.S. consignees. If Canterra were to object to these routings, the U.S. customer would conceivably purchase the product from other competing sulphur producers, either in Canada or in the U.S. Secondly, due to the confidentiality of the precise amount of the transportation rebate to the U.S. purchaser, Canterra no longer knew the final delivered price of its own product. Therefore, it was no longer possible as before for this Canadian producer to independently verify whether the transportation costs to its U.S. customers were competitive. Canterra thus became more dependent upon its customer's market information without being able to ascertain the precise amount of the rail rebate which the latter would derive from a Canterra

origin, nor competing producers' delivered price schedules.

It was submitted that prior to U.S. deregulation, Canterra sold approximately 100,000 tons of liquid sulphur to a certain phosphate manufacturer in White Springs, Florida. This account was lost, in Mr. Regehr's opinion, due to the sudden obscurity of transportation costs caused by U.S. confidential contracts.

Although it was not possible to verify by empirical methods the precise causality of Canterra's above-described customer loss, it is apparent that the company perceived this problem to have been caused by the change in U.S. rail legislation and was looking to the Canadian government to help resolve the situation through the implementation of a public policy solution.

Other Canadian companies, such as Canadian Superior Oil Limited (Calgary) and Noranda Sales Corporation (Toronto), presented submissions to the CTC to the effect that they were also prejudicially affected by the negative impact of their respective U.S. consignees' insisting upon directing transborder routings and the consequent loss of logistical control.

A pertinent element of this discussion is that (as with the Indusmin example) Canadian products were often in direct competition with substitutable products from the U.S. and their respective transportation component was at times a critical factor in determining whether purchasers in either country would select the Canadian producer. To use an analogy, the purchasers of both silica sand or sulphur were competing on a North American "playing field", wherein there were seemingly two sets of game rules.

c) POTASH CORPORATION OF SASKATCHEWAN

In addition to the above-described loss of transborder routing control due to U.S. confidential contract incentives, certain Canadian shippers voiced their concern regarding two other aspects relating to the differences in bi-national transport regulation suddenly caused by the Staggers Act, i.e. the transparency of the Canadian delivered price and the increased price and marketing competitiveness among U.S. railways. For example, Potash Corporation of Saskatchewan (hereinafter referred to as PCS) constitutes the largest producer of potash in Canada. According to its manager of transportation, Mr. A. Elliot, approximately 50% of the company's delivered product price to the U.S. midwest "corn belt" was derived from transportation costs.³³ Potash, which is a fertilizer component, is also produced by competitors in the State of New Mexico and thus the agricultural consumers situated in the States of Indiana, Iowa, Wisconsin, Ohio and Minnesota have a choice between the identical potash product

originating either in the Province of Saskatchewan or in the State of New Mexico.

In 1984, PCS filed a formal submission before the CTC ³⁴ complaining that since the enactment of Staggers, the company's management was no longer able to know the rates which had been agreed to between U.S. competitors and their U.S. rail carriers. By contrast, freight rates for potash from Saskatchewan were still available for public inspection due to the requirements of the Canadian legislation that all tariffs be filed. PCS management alleged that as a consequence of this disparity between Canadian and U.S. rail regulation, the U.S. competition was using the Canadian rates as a benchmark for their confidential contracts, which were serving to diminish the Canadian company's markets. It was this inequity of the U.S. competitors being able to know PCS rates, whereas the Staggers legislation concurrently allowed them to conceal their own freight rates from PCS, which the company was requesting that the Canadian government resolve through modified regulation.

Moreover, any new Canadian or U.S. market which PCS would begin to penetrate, as well as any innovation in equipment type or in intermodal (combination truck and rail movements) routing, would be quickly known to their U.S. competitors, as this information was also required to be published in the Canadian tariffs and publicly filed.

d) GREATER COMPETITIVENESS IN U.S. RAILWAY MARKETING PRACTISES AND PERFORMANCE - CASE OF NOVACOR CHEMICALS LIMITED

Another problem which was perceived by certain Canadian shippers as being attributed to the changes in U.S. rail regulation involved the more competitive marketing practises and performance of U.S. rail carriers following Staggers. Since Canada and the U.S. were oftentimes selling substitutable products into the very same markets, the increased flexibility and intramodal competitiveness of U.S. railways which occurred subsequent to U.S. deregulation was perceived to give the U.S. manufacturer an advantage. The transportation component of otherwise identical products was suddenly subjected to divergent regulatory policies, one which encouraged price competition while the other continued to allow collective rate-making. In my "Impact of Deregulation on Marketing" (published 1986, CTC Research Branch), an analysis was conducted of the different marketing strategies which were selected by U.S. railways such as Burlington Northern, Conrail and the Soo Line once they were no longer permitted by law to jointly establish uniform pricing policies under the aegis of the U.S. rate bureau. The prohibition

of collective rate-making by Staggers appears to have engendered a heightened interest in individual U.S. railway marketing practises, such as experimentation with new equipment technologies (double-stacking of containers onto rail flat cars), a greater orientation towards rail customer service (reduction of transit times) and both internal and external restructuring (mergers between connecting railways, telemarketing and operating co-ordination agreements between U.S. rail carriers). These U.S. marketing activities had the cumulative effect of assisting many U.S. manufacturers and producers by either reducing their transportation costs through price reduction or by enhanced service or equipment guarantees. By contrast, the Canadian railways were not involving themselves in the above process of business redefinition. Canadian shippers attributed this seeming disinterest in marketing strategy experimentation to the maintaining of Canada's legislative status quo and claimed that their products were not as competitive in continental and international markets because of the disparity in laws.

Novacor Chemicals Ltd., a petrochemical company headquartered in Calgary, Alberta introduced its submission to the Canadian Transport Commission public inquiry in October, 1984 by stating that the company had recently sold over 500,000 metric tonnes of their products to the U.S. annually.³⁵ Novacor contended that its U.S. competitors had since 1980 been able to improve their comparative position in the marketplace due to confidential contracts with U.S. railways which not only offered lower freight rates (through volume rebates), but also incorporated service commitments and penalties for non-performance of "delivery time guarantees". Novacor further reported that its ability to compete against these U.S. competitors was being prejudiced by Canadian railways not responding quickly to changing market conditions. It is uncertain whether this referred to the statutory delay (30 days) required in Canada for public filing prior to increasing a rate or the customary delay caused by the two Canadian railways consulting with one another before implementing a rate change, even on a single-line movement. In either case, Canadian rail legislation (i.e., provisions concerning filing or collective rate-making) was being held accountable for Novacor's reduced competitive position. Similarly, both Union Carbide Canada Ltd. and Consolidated Bathurst (now Stone Consolidated) complained to the CTC that the improved performance of U.S. railways since Staggers, was not being experienced in a corresponding manner by Canadian shippers.

e) CANADIAN CHEMICAL PRODUCERS ASSOCIATION

The Canadian Chemical Producers Association (CCPA) in 1983 represented 66 member com-

panies employing over 30,000 Canadians and producing approximately 75% of the \$9.3 billion worth of industrial chemicals and synthetic resins manufactured in Canada. Although the CCPA focused primarily on policy recommendations in its government presentations [see Chapter 10(h)] this Association offered some preliminary data regarding the industry's exposure to U.S. transport deregulation.

The CCPA submitted a brief to the Canadian Transport Commission public inquiry into the impact of U.S. deregulation confirming that a large portion of the Canadian demand for organic and specialty chemicals was traditionally met by U.S. imports. Conversely, in 1983, exports to the U.S. represented 35% of the production of the Canadian chemical manufacturing industry. Oftentimes the identical products were concurrently being imported into and exported out of Canada, due to both the absence of tariff barriers on these commodities as well as locational efficiencies within a North American continental economy. Since transportation costs constituted from 10% to 35% of the delivered price of various chemical products, depending upon the specific commodity, regulatory divergence which would result in lowering the transportation costs of one country's shippers could cause a significant increase to that country's chemical exports.

f) CANADIAN FERTILIZER INSTITUTE

The Canadian Fertilizer Institute (herein referred to as CFI) provides a final example of a pressure group which represented Canadian producers of such commodities as sulphur, potash, anhydrous ammonia and nitrogen phosphates, i.e., fertilizers which traditionally competed for U.S. markets directly against U.S. producers. The CFI submitted the following data to the Canadian Transport Commission reflecting the diminishing volumes of fertilizer shipments of its members from Canada to the U.S.A.

<u>Year</u>	<u>Metric Tonnes</u>
1979	6,846,279
1980	7,512,370
1981	7,186,203
1982	6,184,999
1983	5,065,730

The CFI attributed these losses of its members' markets to the differences in transport regulatory

policy which had become evident since the enactment of the U.S. Staggers Act.

Conclusions

This chapter was intended to examine whether certain elements of Hypothesis I were valid as they related to the competitiveness of Canadian products, as distinct from Canadian rail services. The revenue attrition and loss of routing control reported by the Canadian Fertilizer Institute and Canterra Energy respectively confirm that the less regulated transport environment in the U.S. was making competing Canadian products less desirable in the international marketplace. The Indusmin case and the Canadian Chemical Producers Association furnished corroborative data indicating that Canadian domestic markets were equally being exposed to the more competitive U.S. transportation industry's marketing reach. Lastly, the Potash Corporation of Saskatchewan and the Novacor testimony are clear examples of Canadian shippers perceiving that this erosion of revenue was primarily caused by the occurrence of U.S. rail deregulation and the divergence of bi-national transport policy within North America.

This chapter also provided further empirical evidence that the 1980 changes in the regulatory structure of the U.S. rail transportation industry had a significant impact upon that country's trading partner, Canada. Thus, the commencement of a proof was being established both from the supply (rail carriers) as well as the demand (rail shippers) sides of the Canadian transportation industry to the effect that a problem of national scope existed which could most appropriately be resolved by formal legislative amendment to the existing rail regulatory policy of Canada.

END NOTES

32. *The "Frash method" involves the inundation of a salt mine with boiling water so that the minerals will melt underground and then be siphoned upward in a liquid state for purification and distribution. During the interview with Mr. D. Kanten and Mr. J. Regehr, distribution managers for Canterra in Calgary, January 1987 (the sulphur division was renamed Saskaterra in 1988), it was confirmed that while 70% of Canterra's sulphur production was destined overseas, the remaining 30% was sold to Canadian and U.S. destinations.*
33. *Interviews in Saskatoon, Saskatchewan and Ottawa, Ontario during 1983-1984 with both Mr. A. Elliot and Mr. W. Irvine, distribution managers for PCS.*
34. *Submission of the Potash Corporation of Saskatchewan Sales Limited to the Railway Transport Committee of the CTC Concerning the Known Effects and Implications for Canadian Railways and Shippers of the Deregulation of the U.S. Railway Industry, Saskatoon, Saskatchewan, September 14, 1984.*
35. *An interview was also conducted with Mr. R. Burns, transportation manager for Novacor in 1987 in Toronto. It should be noted that since so much of Novacor's traffic was destined to the U.S., this company also benefitted to a degree from the comparative efficiency of U.S. railways of which it was complaining.*

CHAPTER 7:

COMMODITY FLOW DATA OF THE CANADIAN TRANSPORT COMMISSION

Introduction

One final method of testing whether the Canadian railways had experienced a significant attrition of traffic revenues, as is formulated within Hypothesis I, was to research the statistical waybill data which was obligatorily submitted to the Canadian government by CN and CP Rail prior and subsequent to U.S. deregulation.

The objective of this chapter is to verify from original research conducted in 1988 whether evidence which was not available during the public debates regarding the impact of Staggers would corroborate or negate the validity of Hypothesis I as it related to the competitiveness of Canadian rail services following U.S. deregulation. An independent source of data, i.e. the CTC Commodity Flow records, were studied for the purpose of discerning trends in long-haul rail movements from 1968-1985 and to discover whether Hypothesis I would be confirmed. So as to offset the potential bias which may have been reflected in the material previously assessed of certain pressure groups whose interests would have been enhanced by remedial legislation, this autonomous data base was used to monitor whether the Canadian railways had indeed suffered significant and continuing revenue losses since the changes which had occurred to U.S. transport policy.

For example, the afore-cited CP Rail evidence (Chapters 3 and 4) had only partially measured one railway's revenue losses and long-haul routing diversion for a period of two years. The CTC Commodity Flow data covered a far greater scope in that it reported revenue statistics for both Canadian railways over the five year period following the enactment of Staggers. Thus, if results similar to those of the earlier CP Rail data were obtained, this should diminish any weight given to counter-theories opposed

to Hypothesis I, to the effect that the negative impact may have instead been due not to a divergence of bi-national policy but rather to the economic recession of 1981-1982, or to sudden changes in the U.S. housing market (lumber demand), or to periodic currency exchanges disparities.

a) DESCRIPTION OF DATA BASE

The source of data which has herein been used in the further evaluation of possible transborder traffic diversion and revenue attrition occurring in Canada following U.S. rail deregulation in 1980, derives from statistical information made publicly available by the Canadian Transport Commission. In 1967, when the Canadian Transport Commission was formed, one of the tasks of its newly created Traffic and Tariffs Branch was to study the changes in the revenues and volumes of freight being transported by different modes between Canada and the U.S.A. The CTC therefore required the two major Canadian railways to submit computer tapes relating the origin, destination, tonnage, number of carloads and freight charges on certain transborder movements.

From 1968 to 1985, the CTC periodically released the above-described commodity flow data derived from the combined records of Canadian National and CP Rail, once the regulatory agency had subdivided this information into geographical regions and commodity groupings. Although these CTC Commodity Flow booklets ³⁶ were produced annually, they contained no comparative analysis and were used, if at all, as a statistical basis for other internal governmental reports. Indeed, the CTC did not even employ this source of statistical data for its own public inquiries into the impact of U.S. deregulation on Canadian railways and shippers conducted in both 1983 and 1985, preferring instead to use a special "run" from Statistics Canada's transborder data computer bank.

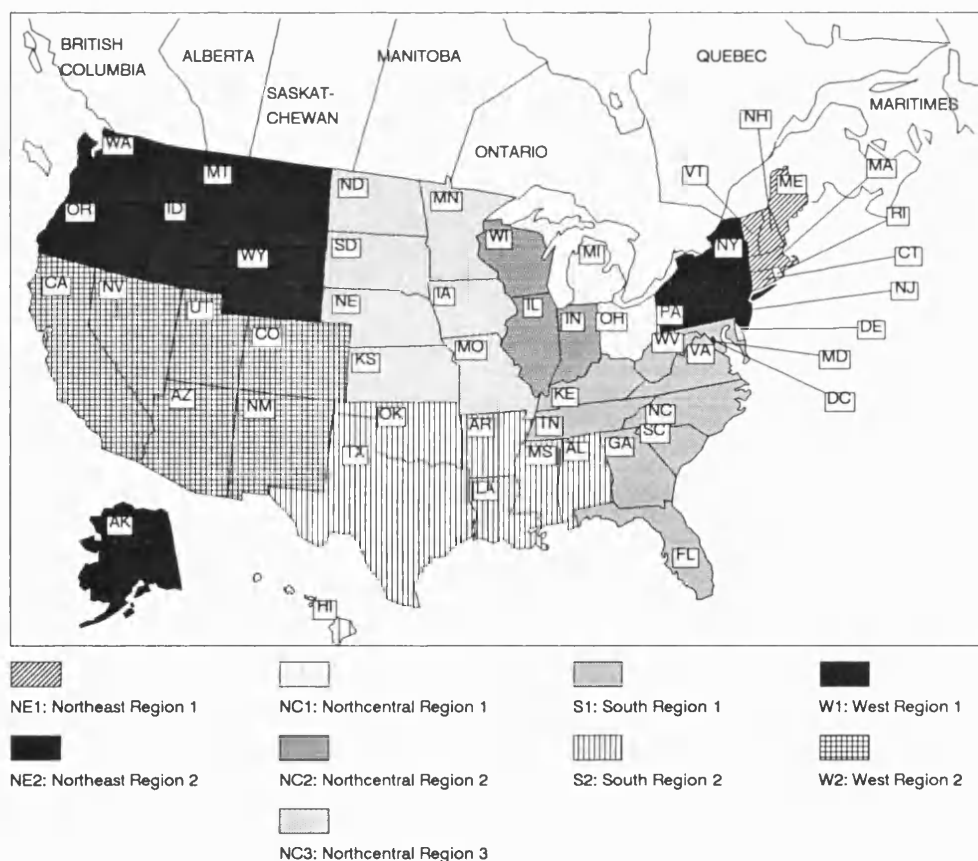
So as to test Hypothesis I, the above-mentioned rail-related CTC Commodity Flow data, from 1968 to 1985 inclusive, was tabulated into a MACRO-LOTUS 1-2-3 computer program in order to measure changes to the transborder revenues of the Canadian railways from 1980-1985, as compared with the period 1968-1979, for certain commodities moving between specific Canadian and U.S. regions. Surprisingly, no comparative analysis of these CTC annual publications had ever been produced previously by any other researchers.

b) DESCRIPTION OF COMPUTER MODEL

The computer model followed the same geographical and commodity classifications identified

in the Canadian Transport Commission Commodity Flow reports from 1968-1985. The model's data bank was thus composed of files containing the published information relative to the number of railcars, tons, the amount of freight revenue (expressed in Canadian dollars), as well as the number of ton-miles and car-miles respectively.³⁷ Each computer file contained the relevant data for the period of one year and relating to one direction of transport for one commodity type. There were five types of commodities (agriculture, livestock, mining, forestry and manufactured products) which were input throughout the 18-year span.³⁸ The origin and destination classifications adopted in the CTC reports divided Canada into 7 regions and the United States into 9 regions, as is manifested in the following chart.

CHART XXIV: CANADIAN AND U.S. REGIONS AS DEFINED WITHIN COMPUTER MODEL



The statistical data from each of the annual CTC Commodity Flow reports was entered into the computer model so that pre- and post-Staggers revenue trends of CP Rail and CN for any one of the five commodity groups and for any specific combination of Canadian region origin and U.S. region destination could be discovered.

This CTC data was incomplete in that it did not encompass all actual carload revenues of the two Canadian railways for U.S. destined merchandise. For example, shipments which originated on provincial railways, such as the British Columbia Railway or the Ontario Northland Railway, and then were transferred to CN or CP Rail for furtherance to the U.S. border (or beyond) were not included. Moreover, certain shippers, perhaps to avoid the payment of customs duties or provincial lumber taxes, would give an international movement the appearance of being a domestic one by instructing a Canadian railway to deliver the merchandise to a border point within Canada (for example, a lumber transfer yard in Quebec or Ontario) and then instruct another carrier to cut a second waybill from this point to the U.S. destination. The Customs Canada B-13 forms would therefore only be required on the "second" movement, as the first one was seemingly domestic; as such, the revenues of the Canadian railway would be substantially understated ³⁹ and the true rail origin of the product would be inaccurate.

Once limitations of this kind are recognized, it is then reasonable to treat the cumulative data from the Commodity Flow reference booklets, assuming that it has been accurately transcribed, as a valid instrument to examine whether or not there was marked Canadian railway revenue attrition and significant changes in the demand for Canadian transborder longhaul movements subsequent to U.S. deregulation.

c) FOREST PRODUCTS FROM BRITISH COLUMBIA TO U.S. NORTHEAST REGION II

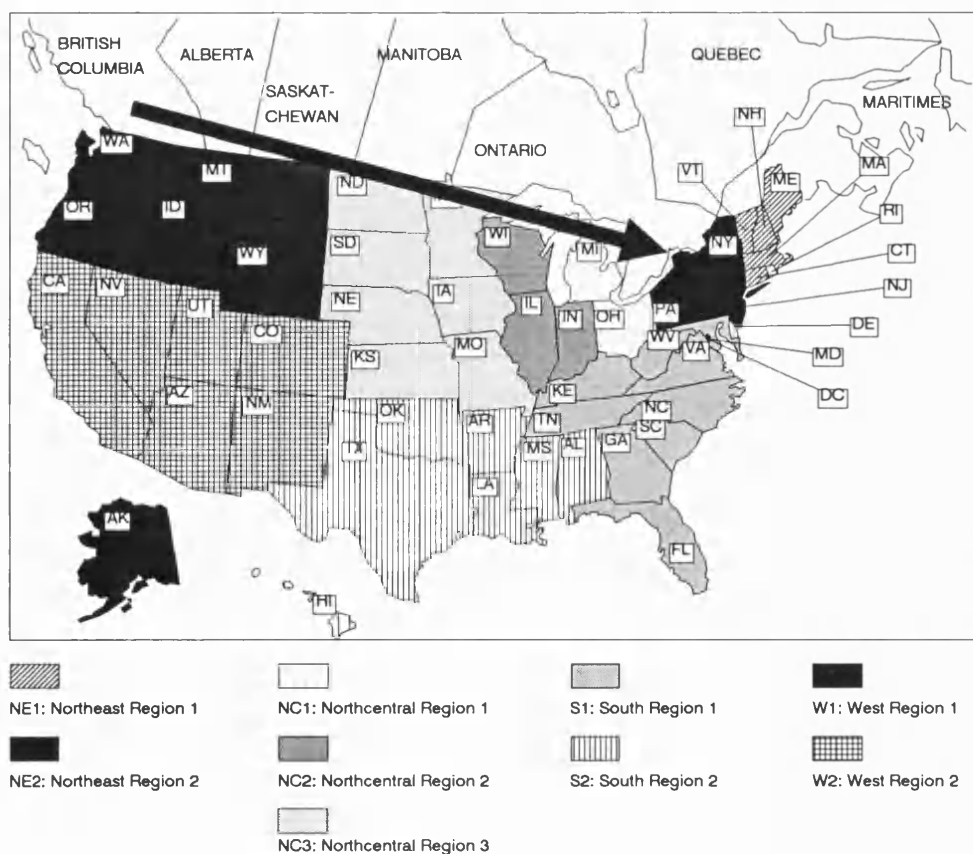
The first example of the results of the above-described computer tabulation involved the B.C. forest industry. As previously discussed in Chapters 3(a) and 5(a), the 1983 CP Rail and CN data had included certain examples of the Canadian railways' decrease of B.C. lumber traffic being transported across Canada, i.e. to be routed via an Eastern Canadian border point to U.S. destinations in the States of New York and Pennsylvania. Due to confidential contract rebates authorized by Staggers, many Canadian lumber shippers had apparently decided to give a U.S. railway the "longhaul routing", which meant that the Canadian railways would be instructed to turn over the lumber at a Western Canadian border point (such as Portal, Saskatchewan) and be deprived in consequence of its longer mileage

revenues.

In 1984, a Preliminary Report of the CTC inquiry officers investigating the issue of transborder revenue attrition opposed the conclusions which had been drawn from the CN and CP Rail data regarding the above-mentioned examples of lumber shorthauling.⁴⁰ The inquiry officers' opposition to the Canadian railway examples were based upon the following arguments:

- 1)The joint Canadian railway allegations were not of sufficient magnitude to justify the \$100 million impact claimed.
- 2)Any losses experienced by CP Rail would likely have constituted equivalent gains by CN Rail.
- 3)Had CP Rail published lower rates on its preferred longhaul routings, it would regain all the lost traffic.⁴¹
- 4)The cause of the revenue attrition on lumber was not due to Staggers, but instead to the 1981-1982 economic recession's effect on U.S. housing starts.

CHART XXV: FOREST PRODUCTS ORIGINATING IN BRITISH COLUMBIA AND TRANSPORTED BY CP RAIL AND CN RAIL TO U.S. NORTHEASTERN REGION 2



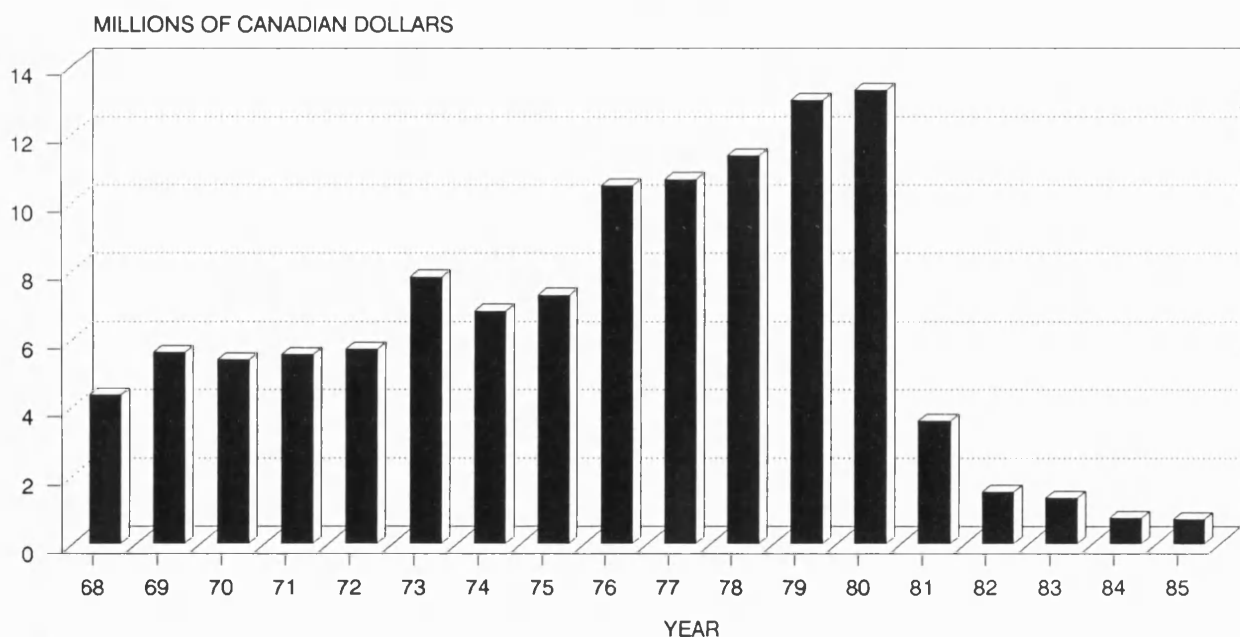
Although the Final Report issued by the CTC in 1985 ultimately over-turned the above conclusions of the Preliminary Report, it should be noted that the computer statistical tabulations which are described in the following charts appear to dispel the logical consistency of the inquiry officers' arguments (1), (2) and (4).

Charts XXV and XXVI clearly demonstrate that both Canadian railways lost significant revenues on transborder lumber traffic over a 5-year period subsequent to Staggers, which went 2-3 years beyond the economic recession. Therefore these charts appear to corroborate the results of the Canadian railway examples.

Similar revenue results were also obtained in the computer tabulation using other origin-destination pairs, such as B.C. to NEI or Alberta to NE2 (see Chart XXIV).

Moreover, the above-mentioned CTC Preliminary Report included data which independently confirmed some of the Canadian railway analyses' other findings regarding attrition [see Chapter 3(c)].

**CHART XXVI: REVENUE OF CP RAIL AND CN
DERIVED FROM FOREST PRODUCTS TRANSPORTED
BETWEEN B.C. AND U.S. NE2 REGION**



Source: Statistics Canada

For example, the CTC inquiry officers estimated the following overhead (U.S. - U.S. freight movements via Canada) tonnages: ⁴²

CTC Preliminary Report

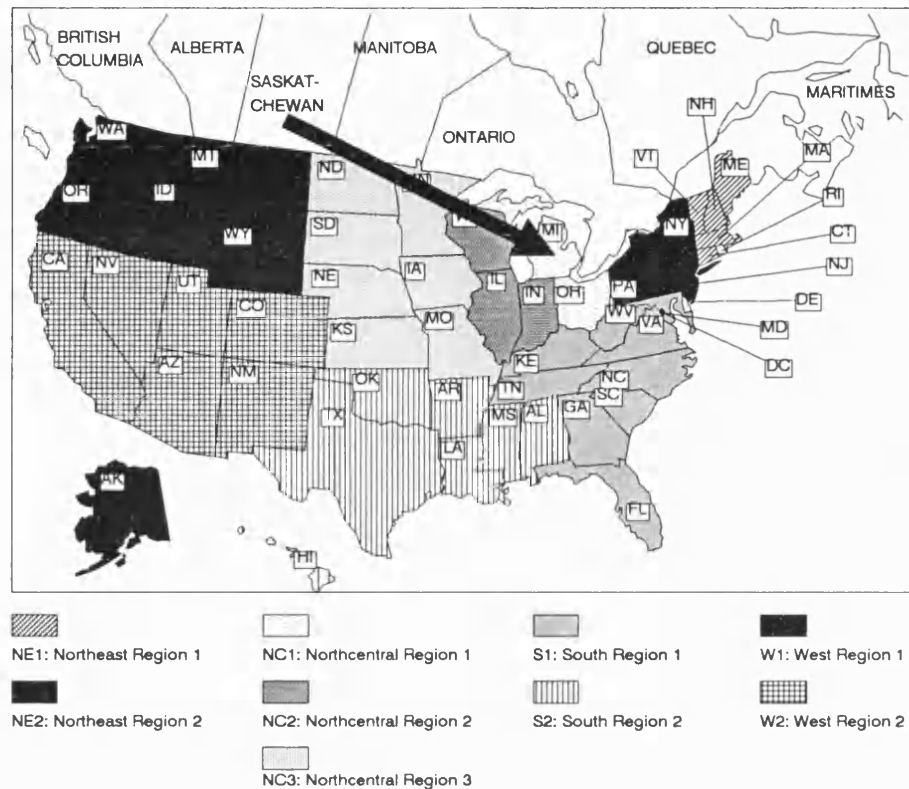
	Overhead Traffic Tonnages				
	1979	<u>1980</u>	<u>1981</u>	<u>1982</u>	<u>1983</u>
C.N. Rail	4,225,000	3,176,000	2,786,000	2,234,000	2,304,000
C.P. Rail	2,072,420	1,882,753	1,975,411	1,726,978	1,634,015

Similarly, the CTC Preliminary Report independently confirmed that the share of CN Rail's U.S.-destined woodpulp traffic which passed over the Duluth, Minnesota gateway (the shorthaul routing) had increased from 35.2% in 1980 to 49.4% in 1983. Conversely, the percentage of such traffic passing over the Rouses Point, New York gateway (the longhaul routing) was recorded by the CTC as having declined from 16.2% to 8.8% over the same period. ⁴³ This data supported the Canadian railways' findings to the effect that Staggers had encouraged the shorthauling of the more profitable routings of the Canadian railways in favour of their U.S. railway competitors' longer hauls by the legislated device of confidential contract rebates.

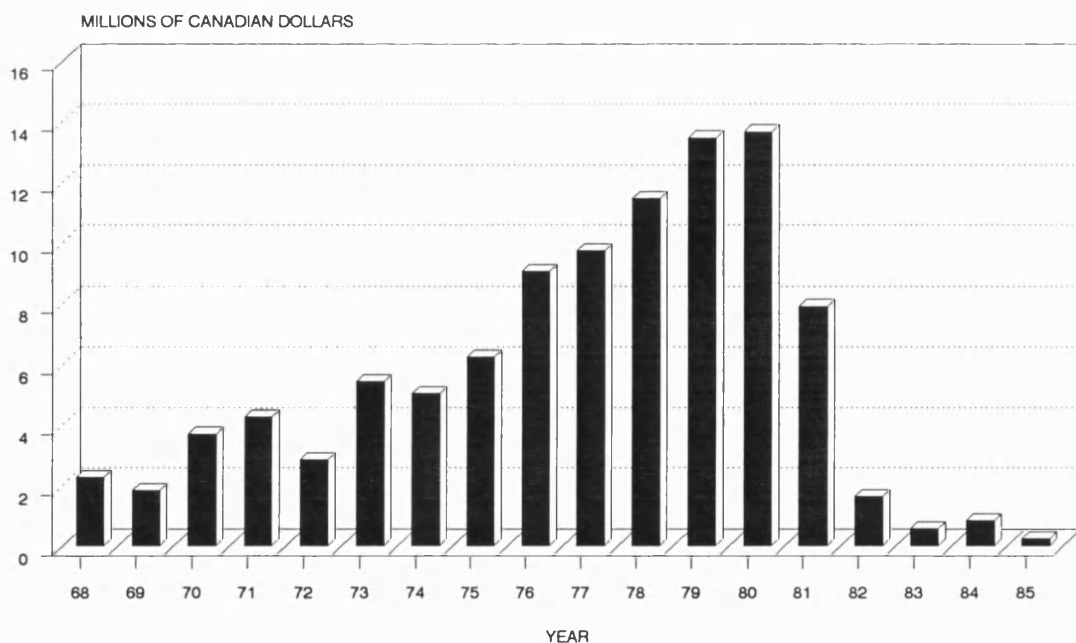
d) MINING PRODUCTS CTC FROM SASKATCHEWAN TO U.S. NORTHCENTRAL REGION I

Returning to the Commodity Flow-based computer model, Charts XXVII and XXVIII further demonstrate the clear attrition of Canadian railway revenue for mining products from Saskatchewan to the U.S. northcentral states of Minnesota and Ohio following the enactment of Staggers. It had been postulated [see Chapter 4(b)] that the transborder movement of potash from Saskatchewan to the U.S. "corn belt" States had often been rerouted in that the Canadian railways were being required since U.S. deregulation to transfer the product at Western borderpoints, such as the Portal, Saskatchewan or Emerson, Manitoba gateways [see Chart XII(A)], where U.S. railways such as the Burlington Northern would transport it through U.S. territory to Chicago and then transfer it to a U.S. destination carrier. This

CHART XXVII: MINING PRODUCTS ORIGINATING IN SASKATCHEWAN AND TRANSPORTED BY CP RAIL AND CN RAIL TO U.S. NORTHCENTRAL REGION 1



**CHART XXVIII: REVENUE OF CP RAIL AND CN
DERIVED FROM MINING PRODUCTS TRANSPORTED
BETWEEN SASKATCHEWAN - U.S. NC1 REGION**



Source: Statistics Canada

could be compared to the pre-~~Staggers~~ routing wherein the Canadian railways transported the potash through Canada and transferred it to a U.S. railway at an Eastern gateway such as Windsor, Ontario [proximate to Detroit - see Chart XII(B)].

If one were to analyze the following example of joint Canadian railway revenue attrition as illustrated in Chart XXVIII, the observation that the Canadian railways had lost approximately \$12 million in 1982 for this commodity group from the one origin - destination pair alone could be substantiated, as well as their having cumulatively lost over \$50 million between 1980 - 1985, given the addition of yearly losses, as compared with the CN and CP Rail revenue of 1980. Moreover, it is reasonable to assume that these losses would likely have continued in subsequent years until the cause(s) of this traffic diversion were removed.

CONCLUSIONS TO PART I

The objective of Part I of the thesis was to test Hypothesis I and examine whether a significant problem of revenue attrition and traffic routing diversion occurred in Canada immediately following U.S. rail deregulation in 1980. Moreover one of the sub-themes of the thesis, i.e. that the change in the regulatory structure of one country's transportation dynamics predictably has a significant impact upon that country's trading partner, was evaluated.

The approximately twenty-five cases which have herein been described, as independently exemplified by CP Rail, CN, individual shippers, shippers' associations, the 1984 Canadian Transport Commission Preliminary Report and the CTC Commodity Flow-based computer model respectively, all lead to the conclusion that the Canadian transportation industry experienced a financially significant and negative impact, as a direct function of the 1980 U.S. rail legislation. The range of commodities, geographical locations and duration of loss would appear to dispel any counter hypotheses to the effect that the impact was not related to the divergence of bi-national transport policy, ie. the revenue attrition instead being either regional in nature, industry-specific or caused by a short-spanned economic recession. Therefore it is now established:

Hypothesis I -That U.S. transport deregulation by encouraging intramodal rail competition would cause an attrition of trade and traffic revenues in Canada, as the predictable cost cutting and pro-competitive marketing practises, characteristic of a less regulated environment in the U.S., would make Canadian products and transport services, the latter still constrained by price

regulation, less desirable in the international marketplace.

Q.E.D.

The cases which have herein been analyzed from diverse sources consistently indicated that both Canadian railways and Canadian shippers were losing their respective export markets as a consequence of the pro-competitive U.S. transport environment leading to pricing innovation, as compared with the more stagnant Canadian regulatory status quo.

Chapter 6 exhibited certain examples, such as Indusmin Ltd., wherein the lower transportation costs of U.S. products caused the displacement of Canadian domestic markets. This would appear to support a variant of Hypothesis I that revenue attrition would apply not only to transborder trade and transport demand, where the deregulated U.S. railways would predictably be preferred over Canadian carriers, but also to domestic demand for Canadian products which would be rendered uncompetitive (due to the comparatively greater transport costs in their overall price structure) as compared with competing U.S. products. Moreover, Fleetwood (vacation trailers), Ford Glass and PPG (car windows) have all indicated informally that their Ontario plants were no longer producing for the Western Canadian market due to decisions by their respective head offices to service this market from another divisional facility within the same companies situated in the U.S.

It was not the purpose of this Part to scientifically demonstrate that the sole cause of the transborder diversion and Canadian carrier and shipper revenue attrition was U.S. rail deregulation. The description and measurement of other possible causes, such as the currency exchange rate, would have been required to determine whether such factors played a partial or neutral role. Nevertheless, from the twenty-five cases analyzed in Chapters 3-7, there can be little if any reasonable doubt that both Canadian railways and many individual shippers perceived U.S. rail deregulation to be the primary cause of the commercial problems being experienced.

This generalized perception led to hundreds of shippers presenting their policy recommendations to the Canadian government between 1983-1987 in order for the latter to institute a new regulatory structure which would effectively resolve this problem of transborder diversion and revenue attrition. Part II analyzes this process of legislative change with a focus upon the strategy selection and policy formulation of pressure groups. Part III evaluates the response of the Canadian government to these pressure group strategies.

END NOTES

36. *Commodity Flow Analysis Series, Canadian Transport Commission, Traffic and Tariffs Branch, Reference Papers No. 3 - 3.10 inclusive. These annual CTC publications however did not include certain categories of movements such as less-than-carload traffic, water-rail movements, or (from 1968-1973) piggyback or container traffic.*
37. *Ton-miles and car-miles are terms frequently used in rail statistical studies for comparative haul measurement, equipment depreciation and costing analyses. They are calculated by simply multiplying the two designated variables respectively.*
38. *Intermodal service, which comprises containers and trailers on flat cars was added only after 1973 to the CTC Commodity Flow Analysis publications. The CTC Commodity Flow data was also derived from Customs Canada B-13 forms which Canadian railway personnel would complete so as to fulfill government duty and excise requirements. The information on these forms, which would accompany each transborder carload consignment, included origin and destination, commodity category, weight by metric tonne and the amount of freight revenue which the Canadian railway would receive for the transportation. It should be noted that the classification of certain products is at times seemingly inconsistent. For example, whereas pulpwood is found under forest products, woodpulp (as well as pulpboard) is classified under manufactured products.*
39. *In 1989, Green Forest Lumber was found to be shipping carloads of Ontario lumber which had been packaged to appear as if it were B.C. lumber, so as to avoid the payment of provincial duty.*
40. *The 1984 Preliminary Report of CTC (Inquiry Officers J. Russel and R. Graham) by virtue of S.81 of the National Transportation Act, 1967, was conducted so as to provide the Canadian Transport Commission with an initial assessment of the impact of U.S. deregulation, in order to assist in the determination of whether public hearings were necessary.*
41. *Aside from the problem of price visibility, argument no. 3 appears to be illogical since C.P. Rail publication of a lower tariff rate would nonetheless have resulted in revenue attrition due precisely to the lowering of the rate.*
42. *C.T.C. Preliminary Report: Inquiry into Effects of U.S. Rail Deregulation, Ottawa, Minister of Supply and Services, 1984, page 13. This part of the CTC analysis confirmed the CP Rail data [see Chapter 3(c)] regarding erosion of Canadian overhead traffic.*
43. *Ibid, page 19 et seq. The CTC Preliminary Report also stated that the share of CP Rail's U.S.-destined woodpulp traffic which passed over the Sault Ste. Marie, Ontario gateway (shorthaul routing) had increased from 8.0% in 1979 to 17.7% in 1982, whereas the Hamilton, Ontario gateway (longhaul routing) traffic had declined from 10.9% to 4.8% during the same period.*

PART II

PROCESS OF DYNAMIC STRATEGY SELECTION BY PRESSURE GROUPS AND POLICY FORMULATION BY THE CANADIAN GOVERNMENT IN RESOLVING THE PROBLEM OF TRANSBORDER TRAFFIC DIVERSION

Chapter 8:

CANADIAN REGULATORY ENVIRONMENT PRIOR TO PROCESS OF LEGISLATIVE CHANGE

Introduction

This Part of the thesis will analyze how different components of the Canadian transportation industry developed their respective strategic lobbying positions in attempting to find an effective solution to what they perceived was the problem (as described in Part I) of U.S. deregulation which was rendering their industry less competitive. The formulation of a new direction for Canada's national transportation policy by so many divergent interests created previously unseen opportunities for discussion, interaction and compromise by pressure groups and provided the possibility of assessing the positions of both Canadian shippers and railways, each force vying for the government to adopt their particular vision of a modified Canadian national transportation policy.

The pressure groups attempting to influence federal government decision-making have herein been divided into four general categories i.e. (a) individual shippers, (b) shippers' associations, (c) provincial governments and (d) Canadian railways.

Each category of pressure group will be studied independently in terms of intra-group con-

flict/synergy, logic of its public submissions, as well as the effectiveness of the respective strategic plans upon the subsequent modifications to Canada's national transportation policy. Moreover, differing postulates and hypotheses will be tested for each category of pressure group in order to discern their validity with regard to the behaviour, strategy selection and transport policy formulation of such lobbying entities.

Chapter 8 is intended to describe the regulatory environment which characterized each of the major groups of players wishing to affect change to public policy prior to initiating their respective strategic planning process in 1983, as well as to fully define the category of individual shippers.

a) REGULATORY ENVIRONMENT

The scope of the strategic position which each pressure group had to address was made more complex by the fact that not only changes to the regulation of transborder movements were being considered, but also whether the regulation of Canadian domestic rail movements should be similarly altered. The very process of establishing a definitive stance on such a wide range of regulatory issues was most uncustomary in the Canadian transport industry and involved some degree of risk for several of the participants. Many individual shippers had to consider the possible consequences of retaliatory reductions in rail service or the imposition of higher freight rate levels during the next negotiating period, if they would adopt a strategic position which was opposed to the policy recommendations favoured by the railways. Other Canadian shippers were apprehensive that by formally participating in the regulatory debate, they would be obliged to answer questions relating to the rebates which they or their U.S. affiliates had received from U.S. railways since Staggers, thereby exposing both their companies and these U.S. carriers to possible legal prosecution for having contravened Section 381 of the Railway Act of Canada. Several other shippers were not persuaded that the financial and personnel investment necessary to participate in the strategy selection process was warranted given the historical tendency for the Canadian government to allow the railway management to act as the spokespersons for the entire transportation industry.

Shippers' associations, too, had to face unprecedented choices regarding future strategic direction, as their membership was often divided between companies situated in areas serviced by more than one Canadian railway and which therefore were likely to benefit from confidential contracts, rebates and extended interswitching, and those companies which were captive to one railway and were unable to

anticipate intramodal rail price or service competition. Furthermore, Canadian shippers' associations generally "shared" some of the same company members and were not accustomed to working together for fear that they might not appear to be uniquely serving the needs of these corporate subscribers. For example, a company's traffic manager might typically belong to both the Canadian Manufacturers Association and the Canadian Industrial Transportation League. If both entities were seen to have adopted identical policy positions, member companies might be less predisposed to continue paying the annual dues of two lobbying associations.

The Canadian provincial governments were similarly cautious in formulating policy recommendations which would appear to favour their competitively situated shippers over rail captive producers located within their province. Moreover, by adopting a strategic stance opposed to that of the railways, the provincial government would be jeopardizing their share of regional railway employment. Unlike the shippers' associations, many of the provinces preferred to act in a collectively co-ordinated manner with regard to rail policy positions. This was perhaps one way of protecting their respective administrations from the individual responsibility of determining transportation policies which would appear to favour one group of corporate citizens over another.

The Canadian federal government's role in railway policy formulation could be characterized as being remarkably low-key during the decade which preceded the revenue attrition and transborder routing problems which have been described in Part I. This may have been due in part to the increased attention given by the federal government to provincial concerns in order to offset the frequent criticism against then Prime Minister Pierre Elliot Trudeau for his position favouring the centralization of the Canadian political structure. In order to allay Mr. Trudeau's fading popularity, Canadian federal government departments, such as Transport Canada, may have deliberately attempted not to provoke such accusations from the provinces by shying away from directionist policy action and instead acting as a consensus builder for the ten provinces. Whatever the cause, there existed a distinct lack of leadership by the federal government with regard to Canada's national transportation policy in the early 1980's.¹

Therefore, neither the Canadian shippers, their associations, provincial nor federal transport departments were accustomed nor predisposed towards actively considering the possible solutions to the revenue attrition and traffic diversion problem which occurred immediately following U.S. deregulation, as has been tested at Hypothesis I.

b) DEFINITION OF THE TERM "SHIPPER"

In order to assess the strategic positions taken by Canadian shippers in their formulation of an amended national transportation policy, a definition of this category of pressure group should first be given.

A "shipper", as defined within the trade, is generally an incorporated entity which has the capacity to require a railway to transport freight. This may include origin consignors and destination consignees, as well as freight consolidators and even other modes of carriage. For example, a steamship line which arrives at a Canadian port and offloads its containers onto a railway of its choice for the through movement to destination would be encompassed within this category. Thus, shippers may not be Canadian companies nor originate in Canada and they need not necessarily pay the freight charges. Shippers frequently divide some of their surface freight transportation requirements between the rail and the trucking modes, depending upon the rates, the distance involved, the time sensitivity of the market and the availability of an adequate supply of equipment (for example, tank cars or boxcars) at any given time.

c) "CAPTIVE" AND "COMPETITIVELY LOCATED" SHIPPERS

Shippers are usually identified as captive or competitively located and either large or small. Although these generic classifications are oftentimes not meaningful for empirical research, these terms comprise a standard part of the North American transport industry's vocabulary. A captive shipper is one whose transportation requirements are limited geographically to only one railway at origin or at destination. Thus, a mining company whose quarry were situated in Northern Manitoba (such as International Nickel Co. in Thompson, Manitoba) would be captive at origin to CN Rail, since CP Rail trackage is situated hundreds of miles away. By contrast, a pharmaceutical products company located in Montreal (such as Johnson and Johnson) whose plant is within a mile or two from either the CN Rail or CP Rail main line is not deemed captive, but rather competitively located.²

The permutations of these two categories of shipper are multifold. For example, a shipper captive to one railway at origin may be captive to another at destination. Some of a competitively located shipper's traffic at origin may be destined to a point captive to only one railway. The veritable meaning of captivity is often found in the pressure which may be exerted by either shipper or railway in their negotiation of terms of carriage, as captive shippers often pay 30% higher rates than do competitively located shippers

for the same commodity transported over similar distance (see Chapter 12 (i)(b)). It could be theoretically posited that the majority of shippers which were to make efforts to change the Canadian national transportation policy would be captive according to the definition given above and that their recommendations (in favour of such concepts of extended interswitching and competitive joint line rates) were primarily intended to diminish the importance of their geographical captivity to one railway. However, this theorem would need to consider the number of competitively located shippers supporting the captive legislative provisions. Furthermore, certain geographically captive shippers have asserted negotiating pressure on their respective rail carriers by demonstrating that they were not modally captive. For example, the Canada Post Corporation eliminated its traditional usage of the railways in 1986 by contracting with a competing trucking firm.³ Several petroleum companies have built pipelines to transport their liquid petroleum gas (and slurry coal) products, rather than be obliged to accept the Canadian railways unilateral rate increases.⁴ Cominco, a mining company, in 1988 developed a barge system to transport the ore from its Red Dog site in Alaska to the B.N. railway in Vancouver rather than be captive to CP Rail whose railhead was proximate to the origin mine site.⁵

Another recent example of how a shipper's rerouting has deprived the Canadian railways of their joint influence is K-Line Steamship Co. The Japanese steamship company, in 1987 ceased docking at the Port of Vancouver in favour of a Californian port (Longbeach) where the containers were double-stacked (a technological innovation not yet adopted by the Canadian railways) and railed by U.S. railway to the eastern Canadian gateway of Welland, Ontario for furtherance northward by rail or truck.⁶ Therefore placing too significant a designatory value on geographically captive shippers in terms of assessing their collective motivations or lobbying actions as a pressure group would not reflect the fact that some might be modally competitive while others, captive in one location, might exert influence upon the railways since they were competitively situated at their other facility locations.

d) "LARGE" AND "SMALL" SHIPPERS

The distinction between large and small shippers is a concept which is often referred to in discussing strategy selection pertaining to rail transport policy, but generally ill-defined by any empirically standardized methodology. For example, the proponents of legislative change in transport policy from 1984-1987 would customarily justify the need for the enactment of mechanisms such as final offer arbitration or a third party appeal of confidential rail contracts, (see Part III), by citing the previous

disenfranchisement of small shippers from meaningful rate/service negotiation and the likely discrimination by railways of this category of shipper. It is ironic that it was usually the larger shippers which typically made these representations rather than small shippers themselves. It is therefore perhaps understandable why these legislative recommendations were never suggested in a way which would have limited their usage to the category of shipper which they were meant to protect. Thus these two statutory provisions were proposed and defended as being open to all shippers, both large and small even though they were allegedly required to protect only the latter category.

The terms "large" and "small" as applied to shippers, appear to be unsuited for scientific measurement for several reasons. Firstly, these terms do not refer to the size or production of the enterprise, but rather the extent to which the railways (as compared with motor carriers) are used in the transportation of the firm's in-bound or out-bound merchandise. As such, the same company may typically be a larger shipper one year and a much smaller shipper the next. The non-availability of measurement data regarding companies' potential usage of the rail mode constitutes a further significant weakness in the "large/small" terminology.

Another difficulty lies in the determination of an acceptable cut-off point regarding a shipper's actual rail expenditures, which would be recognized by the users, suppliers and regulators of the transport service. For example, CN Rail's marketing statistics division produced an annual listing which was circulated internally, describing the company's 150 most important customers.⁷ The 1987 listing describes the Saskatchewan Wheat Pool, which paid CN freight revenues of \$182 million, as being in the first position. The 150th customer, Alta Food Products, had during the previous year, paid \$5.6 million to CN. CN Rail also maintains a list of their most active 1200 customers, although this is not circulated within the company.

CP Rail produces an internal corporate listing depicting their 700 most important customers, with the top 300 in order of revenues paid to the railway.⁸ Unlike the CN listing, the CP customer bank does not include in its list the specific volumes or revenues which each customer generates, nor are subsidiary customer firms grouped into one corporate family account. The CP Rail listing however does have the names of the transportation executives of each customer, as well as the CP Rail marketing representative responsible for each account. There existed yet another listing which was circulated on a quarterly basis within the marketing department of CP Rail, and called the "million dollar list" as it depicted all customers which individually had paid the railway the amount of at least one million dollars in freight revenues during the previous year.

The above-described measurement by the Canadian railways of their most important shippers is therefore based upon a somewhat arbitrary revenue cut-off point and provides no uniform basis for the empirical designation of the "large shipper" category. Indeed, the 170th customer of CN may have provided it with a greater profit than the 140th, as revenue data without the respective costing statistics is a factor of relative value. Similarly, the 340th customer of CP Rail may have been exceedingly important to the backhaul traffic flows between a given origin/destination pair or may have been instrumental in preserving the cost efficiency of an otherwise infrequently used branchline.

Lastly, the risk in arbitrarily designating a revenue definition of "large shippers" is that one tends to focus one's research away from those shippers which may be slightly below the mark but which may equally exhibit characteristics similar to the higher category. Furthermore, it is by no means certain that those not fitting in the "large shipper" category would logically fall into the "small shipper" group, as there may theoretically exist other quantifiable categories of size between the two. Therefore, although the terms "captive" and "small" shippers are used throughout the administrative and legislative inquiry proceedings which transpired in the consideration of change to Canada's national transportation policy, this thesis has attempted to qualify these classifications as their usual definitions do not appear to be suitable for empirical analysis.

Conclusions

The objectives of Chapter 8 were two-fold. Firstly, the regulatory environment surrounding the major non-railway constituents in the process of public policy modification was briefly described for the pre-1980 period.

The selected time frame portrayed the lack of policy activism within the Canadian transportation industry immediately prior to the implementation of strategic planning by these pressure groups which would be attempting to resolve the problems described in Part I.

Secondly, the term "shipper" was defined in greater detail and in the context of customary usage within Canadian commerce. As this vocabulary including such terms as "captive" and "small shippers", was employed by intervenors and regulators throughout the period of legislative debate, it was deemed necessary to qualify such terminology.

ENDNOTES

1. As an example of this patent reservedness on the parts of both federal and provincial transportation departments the author, as CP Rail's manager of economic development in 1981 convoked a meeting of Transport Canada, the Canadian Transport Commission and representatives of the ten provincial transport ministries in order to discuss two white papers which had been produced by Transport Canada on the subject of the absence of need for possible regulatory change in railway policy.

These two white papers had been written by Transport Canada's Strategic Policy Division (Dr. I. Logan and Dr. Z. Haritos) and had addressed from a historical perspective, subjects such as the future of collective rate-making and resolution of international rate issues. Discussion Paper on Legislative Proposals Regarding Railway Freight Rates, (March 24, 1980) and The Regulation of International Railway Rates (Transport Canada TP 2399, March, 1980).

CN Rail and most of the ten provincial governments dutifully sent one official each and Transport Canada and the Canadian Transport Commission predictably sent two. What is remarkable is not that such a meeting took place between federal and provincial transport officials to discuss Transport Canada policy initiatives, but rather that a manager of CP Rail, through a self-initiated mandate, could have convened it. CN Rail would not have called the meeting due to the Crown corporation's being then perceived as too closely linked with the government. Transport Canada officials stated that they could not have called the meeting as it would have been seen as too aggressive an action by the provinces' respective transportation departments and by the CTC. Nor would any of the individual provincial governments have felt comfortable in singularly calling such a meeting. As a consequence of this collective reticence, a gathering of this kind had apparently not taken place for over three years.

2. Interviews with Mr. M. Babulek, traffic manager, International Nickel Co. and Mr. C. Roussel, traffic manager, Johnson and Johnson. As it could be expected that most plant facilities within large population centers would be connected to the main line of both railways by rail sidings, there existed an interswitching rule (1908, General Order T-12) which allowed for any company situated within a four-mile radius of a railway other than the one to which it had leased its siding, to request a connection by the local railway at 1 cent per ton mile, Op. Cit #116.

3. Interview with Mr. L. Bougie and Mr. J. Lepore, managers of contracting services at Canada Post, in Montreal, October 14, 1988.

4. Interview with Mr. G. Goddard and Mr. K. Shinya, transportation managers, Esso Resources Ltd. in Calgary, June 1988 regarding the company's Cold Lake, Alberta facility.

5. Interview with Mr. J. Murphy, Transportation Manager, Cominco, Toronto, December 1987.

6. Interview with Capt. J. De Vries, K-Line's Canadian General Manager, Montreal, June 1988.

7. CN Rail Marketing, Top 150 Customers, 1987, confidential document.

8. CP Rail, 1982 and 1987, "Top 300" Shippers, confidential documents.

CHAPTER 9:

INDIVIDUAL SHIPPERS - ANALYSIS OF STRATEGY SELECTION AND POLICY RECOMMENDATIONS

Introduction

Once the first hypothesis of this thesis has been tested and pro-competitive marketing practises among deregulated U.S. railways have been seen to result in the attrition of trade and traffic revenues in Canada, it becomes appropriate to explore how the affected Canadian industry would respond to this serious economic problem.

The objective of this Part is to critically assess the process of dynamic strategy selection in which various Canadian pressure groups participated between 1983-1987 in order to change the national transportation policy of Canada and thereby resolve the problem of traffic diversion. The first pressure group to be so analyzed will be individual shippers.

Two hypotheses will be examined in this chapter with regard to this constituency of the Canadian transportation industry:

Hypothesis II -That shippers would predictably seek greater competition between Canadian railways due to the expectation of lower freight rates and thus be in favour of new legislative measures similar to U.S. deregulation.

Assuming that a Canadian company had suffered market attrition which it perceived was caused by a differing and more advantageous regulatory framework in the U.S., would it not be logical for this company to recommend that the new transport policy for Canada conform identically to that U.S. legislative structure? Alternatively would national pride or customary usage of the Canadian regulated status quo make individual shippers fearful of experimenting with pro-competitive transport legislation which would expose their companies to a harmonized continental environment without regulatory protection from rate differentiation?

Hypothesis III -That shippers would exhibit different strategic positions based upon their respective size, market share, or captive/competitive rail location, in that the larger and/or competitively located shipper would anticipate greater railway rate discounts and thus tend to be in favour of deregulation.

Would companies which were dominant in their respective markets not anticipate that greater rebates would be offered to them rather than their smaller-volume competitors and therefore be in favour of minimal regulatory intervention? Conversely, could one reasonably postulate that shippers located in a region which was served by only one Canadian railway would typically not espouse a strategy in favour of deregulation as the benefits of intramodal rail competition would likely elude them?

A variant of Hypothesis III would be that shippers which were subsidiaries of U.S. multinational firms would be more likely to be in favour of policy reform similar to Staggers.

Was it reasonable to assume that strategy selection by a Canadian subsidiary would follow a similar direction previously taken by the U.S. parent corporation?. Alternatively, was transport policy not an area which would warrant head office intervention, perhaps because the domestic benefits of the 1980 U.S. legislation had not yet been recognized by the parent company or because of the lower corporate profile which typifies the traffic function (as compared to finance or marketing)

A further variant of Hypothesis III would be that individual shippers would formulate recommendations which would encompass both their own economic interests as well as those of the railways (win-win strategy), rather than displaying a self-serving and antagonistic lobbying position (win-lose strategy).

Theoretically, one could hypothesize that the greater the extent of compromise in a pressure group's lobbying position would be inversely proportionate to the disputative efforts of the opposing interest.

A corollary theory to this first postulate would be that even though disputation is inevitable in order to justify each pressure group's self-expectations, the closer a proposal is to the maximum number of possible components most favourable to its position, the greater the "threat" which would be perceived by the opposing group and the likelihood of any countering organizational activities.

Conversely, one could suggest that no matter how balanced one pressure group's proposals were, the opposing group will predictably expend a no less constant amount of energy lobbying against the proposed compromise for yet further concessions to the opposing group's policy recommendations rather

than acknowledging the intended "win-win" strategy of the proponent.

It is recognized that specific empirical measurement of the varying degrees of compromise in such proposals would be difficult. Moreover, such forecasting of the anticipated acceptability of a pressure group's policy formulation to an opposing interest group is distinct from the more critical issue of how the government, the decision-making authority, would likely react to proposals which are more or less balanced. The above two variants of Hypothesis III will be evaluated in this chapter.

Lastly, the general quality of individual shipper public submissions will be examined in order to assess characteristics such as logical or intra-group cohesiveness which could distinguish the comparative effectiveness of this pressure group's representations upon the legislative solution described in Part III.

a) COL-PAC LUMBER COMPANY

Many individual shippers did not participate in the public inquiry process due to some combination of the following factors: (1) fear of railway retaliation vis-a-vis service, (2) years of friendship between the company's traffic manager and railway marketing personnel, (3) a belief that the Canadian railways would ultimately persuade the government in favour of their own policy views, (4) the possible legal exposure of certain Canadian shippers for having accepted rebates from U.S. carriers, and/or (5) the Canadian perception that shippers' associations to which they belonged would adequately make the appropriate representations. Despite the above restraining influences, some individual shippers did make their companies' views known with regard to specific recommendations regarding change to Canada's national transportation policy, given the impact upon their present and future competitiveness which they attributed to U.S. deregulation. These representations often exhibited a wider scope of opinion which the more polished submissions of the shippers' associations category of pressure group (Chapter 10) purposefully restricted in order to find common ground within their membership, as well as to orient the latter's briefs toward those subjects which appeared more likely to receive political approval.

One such company to formulate its own independent policy recommendations was Col-Pac Lumber Company, an enterprise which claimed to have wholesaled over \$140 million of British Columbia lumber to customers both in Canada and in the United States from 1972-1984. This individual shipper recommended that Canadian national transportation policy continue to include obligatory freight rate transparency. The president of this Canadian company was of the view that deregulation of rates, and in particular contract confidentiality, would cause significant prejudice to firms such as his own in favour of

those competitors who were able to obtain better rate levels and secret discounts from the railways through greater traffic volumes:

"We are alarmed by the recent moves by the large rail shippers in our industry to change the basis of setting rail rates within Canada. The introduction of the Staggers Act in October 1980 in the United States has had a chaotic effect in that country...It is our contention that whether rates are set competitively or on a collective basis, they should at all times be open to scrutiny by all the participants in the market process." ⁹

The Col-Pac position assumed that (a) U.S. and Canadian domestic and transborder transportation policies could continue to be different, the former allowing confidential contracts and the latter prohibiting them, (b) the deleterious effects of this regulatory divergence upon Canadian traffic as has been examined in Part I were not serious or were not caused by U.S. rail deregulation and (c) competing shippers with larger volumes would not obtain discounts even if the rates continued to be publicly filed.

This last assumption perhaps warrants some additional questioning as the Canadian railways had been practicing a certain degree of lawful public price differentiation for decades. Moreover, it has been noted that certain Canadian shippers were already receiving rebates from U.S. railways conditional upon directing a long-haul routing to the latter, even though this practise was contrary to Section 381 of the Canadian Railway Act. Lastly there appears to be some inconsistency in the quoted statement that rates should be "set competitively" and concurrently be subject to the scrutiny of rail competitors. Wouldn't the advantages of competitive bidding be undermined if each Canadian railway could become aware and adjust to the other's rate levels as soon as they had been publicly filed?

b) INDUSMIN LIMITED

Indusmin Ltd., the producer of silica sand previously described in Part I of this thesis was also opposed to those changes occurring to the national transportation policy of Canada which would be similar in nature to the provisions of the U.S. Staggers Act. In order to ensure the continuation of a separate and distinct Canadian regulatory environment wherein rate transparency was preserved, Indusmin's representatives recommended that the Canadian Transport Commission be empowered to demand copies of U.S. railway confidential contracts on all transborder movements in order to investigate whether the rates were compensatory, in conformity to Canadian railway legislation. ¹⁰

The Indusmin position, similar to that of Col-Pac Lumber, appeared to reject the concept of inevitability of legislative transport harmonization based upon a common North American marketplace. In this regard, neither of the above shippers acknowledged the question that if the U.S. railways would continue to be governed by a more price competitive environment, would it not be likely that the higher cost Canadian transportation component would, over time, endanger Col-Pac and Indusmin's international and domestic markets?

Furthermore, the policy recommendations of Indusmin to the effect that the CTC be empowered to investigate U.S. railway contracts on transborder movements appears to have been ill-advised on two counts. Firstly, Sections 286(1) and 287 of the Railway Act of Canada already gave the CTC that very power, even though the agency had traditionally declined to use this authority. Secondly, it would have been ineffective to have the CTC review these contracts for the purposes of identifying non-compensatory rates, as Indusmin suggested, given that the U.S. contract rates in all probability would have been found to be compensatory,¹¹ while at the same time less than the rates on competing long-haul movements transported by the Canadian railways.

It may have been more effective for Indusmin to have adopted one of the following alternate policy strategies: a) requesting the Canadian Transport Commission to enforce the existing legislative provisions against U.S. railways contravening rate filing requirements, b) requesting the CTC to prosecute those Canadian shippers which accepted rebates from U.S. railways, c) proposing that the Canadian government take measures so as to inform the U.S. Secretary of Transport of the contraventions to Canadian railway law by U.S. railways so that these practises could be averted by U.S. governmental decree.

Although the substance of Indusmin's policy recommendations contained certain flaws which have been described above, it should be noted that their individual lobbying efforts were nonetheless among those most frequently considered by government officials. A purview of the Canadian Transport Commission files on the subject of the impact of U.S. deregulation between 1982-1985 revealed numerous letters of complaint to the Minister of Transport on behalf of Indusmin by various senators and members of Parliament representing ridings in which the company's mines were located.¹²

c) ALCAN SMELTERS AND CHEMICALS LIMITED

There were several Canadian shippers whose views regarding change to the Canadian national

transportation policy were in distinct opposition to those expressed by Col-Pac Lumber and Indusmin.

Alcan Smelters and Chemicals Ltd., the largest producer of aluminum products in Canada, prefaced their public submission¹³ by stating that it was unlikely that U.S. transport law would ever be changed to accommodate disadvantages in the pricing of Canadian goods and services. Their company representatives stated that the Canadian legislation must instead be altered. Thus, Alcan recommended that future Canadian transport legislation make confidential contracts and rebates permissible for both domestic and international traffic, i.e. a regulatory environment similar to that of the U.S.

The company rejected the theory that lower rail rates in the U.S. were caused by the economic recession rather than deregulation, maintaining instead that Alcan's U.S. division had received substantial competitive pricing benefits from the Staggers Act well before the recession started. The Alcan spokesmen noted that these overall savings in freight rates outweighed the occasional instances of increased distribution costs due to U.S. railway branch line abandonments which were also a consequence of transport deregulation. The company submission included a statement to the effect that the majority of these abandonments or route cancellations had affected the less efficient and more circuitous routes. Alcan also maintained that the advent of the U.S. Motor Carrier Act of 1980, which deregulated the trucking industry, had been instrumental to their company's obtaining lower rail/truck international through rates from Canadian origins to U.S. destinations, due to competitive pressure between modes.

The Alcan position therefore advocated similar legislation for Canada as existed in the U.S.¹⁴ The possible weaknesses of its submission were 1) the strategy that Staggers-like deregulation was being recommended, based upon the company's positive U.S. experience, may have been less persuasive than a policy position to the effect that these changes would be most appropriate for the Canadian transportation environment, 2) their assessment that U.S. rail line abandonments were in the macroeconomic public interest, would likely never be acceptable to shippers whose products were rail dependent or which were captive at origin or destination to the branch lines of one Canadian railway, 3) the citation of the U.S. Motor Carrier Act having put downward pressure upon intermodal rates could raise a question as to the alleged causal relationship between the Staggers Act and lower freight rates.

d) UNION CARBIDE CANADA LIMITED

Another Canadian company whose substantial transborder freight movements to the U.S.A. had permitted it to evaluate the performance of U.S. railways under a deregulated environment was Union

Carbide Canada Limited. This company used its U.S. parent company's experience as a basis for its formulation of proposed Canadian policy changes. The Union Carbide spokesman stated that confidential contracts under Staggers had encouraged U.S. railways to compete against one another, rather than accept a published rate as the standard for all railways. The company further attributed the legislative prohibition of collective pricing as a causal development toward the streamlining of outdated U.S. railway operating practises, causing significant cost reductions (ex. in historical divisional interline payments) and more aggressive marketing strategies, all of which led to these carriers becoming more efficient.

Based upon these conclusions, Union Carbide recommended that confidential contracts and rebates be allowed both for Canadian domestic and transborder traffic. Moreover, the company proposed that the Canadian legislation be modified so as to prohibit collective rate-making between railways.¹⁵

By adopting the U.S. legislative solution for Canada, Union Carbide may have underestimated the importance of the infrastructural differences which existed between the railways of the two countries. In a Canadian duopoly involving a private and a Crown-owned rail corporation, the predicted competitive behaviour should not have been so readily analogized to the multi-railway U.S. environment. After the enactment of the Canadian legislative "solution" in 1987-88, as will be examined in Part III, the enabling of Canadian railways to compete against one another through contractual rate confidentiality and prohibition of collective rate-making may not have led to the forecasted parallel result of dynamic intramodal competition in Canada, as it had in the U.S.

Of the questionable logical premises in the Union Carbide position, the following should be included:

- a) the assumption that the Canadian railways wished to compete against one another,
- b) the assumption that the Canadian railways would not adopt anti-competitive marketing practises if legislation prevented them from collectively price-setting, and
- c) the assumption that the Canadian railways were too large and/or decentralized to effect a tacit pact of solidarity which would prevent competitive raiding into each other's traditional markets.

In conclusion, Union Carbide strategists may have assumed that the behaviour of the Canadian railway duopoly would be guided by regulatory changes similar to those of U.S. governmental policy, whereas differences in Canadian railway infrastructure, as well as the stabilizing effect of traditional shipper/railway relationships should have more closely been taken into account.

e) CANADIAN SUPERIOR OIL LIMITED

Another viewpoint and lobbying strategy was expressed by Canadian Superior Oil Limited of Calgary, Alberta. It has already been noted in Part I that this company had complained of the loss of control over rail routing which Staggers' rebates given to their U.S. customers were causing (see end of Chapter 6(b)), as well as the fact that this Canadian manufacturer could not know the exact delivered price of its own product. Canadian Superior's solution was to recommend the repeal of that section of the Railway Act (Section 381) which prohibited rebates from being offered or received in Canada.¹⁶

Apart from the obvious problem of implementing such a legislative solution so that rebates (in the absence of Section 381) would somehow co-exist with the outstanding statutory obligation of railways to publish all of their rates, there were other weaknesses in Canadian Superior's policy recommendations. Firstly, it is doubtful that U.S. railways would have complied with the dictates of the Canadian government as were manifested by Sections 286(1) and 287 of the Railway Act to the effect that freight rate rebates to Canadian shippers be filed with the CTC. In other words, once rebates would be permitted in law, they would be subject to the residual regulatory regime governing the obligatory filing of rates with the agency. Secondly, any future regulation of rebating on transborder movements could already be offset by a de facto "understanding" between the Canadian and U.S. connecting railway, that the former appear not to be giving a rebate, while the latter would extend the rebate on behalf of both and merely adjust the joint railway revenue divisions (which were private) accordingly (see Chapter 5(c)). Lastly, assuming that Canadian Superior's solution were accepted and rebating was subsequently authorized in Canada, this would not necessarily have resolved the company's complaint to the effect that they had lost control of the transborder routing. Nor would they be any more aware of the delivered price of the goods, as their competitors' U.S. railway contract rates would still be confidential by virtue of Staggers.

American importers of Canadian commodities who could exert control over the rail routing and had not done so previously because of identical tariffs via different railways, would, as of the legalization of rebates by virtue of Staggers, take advantage of such discounted price incentives if the product were not detrimentally affected due to transit time sensitivity. The solution proposed by Canadian Superior could only have changed the above logistical diversion in the minor sense that Canadian companies which paid the freight charges themselves and could control the routing would be immune from prosecution, once Section 381 of the Railway Act were repealed.

f) CANTERRA ENERGY LIMITED

Another Province of Alberta sulphur shipper which complained of no longer being able to assess whether or not their product's delivered price was competitive, due to U.S. railway rebates, was Canterra Energy Ltd. As has been previously described in Part I, this company had provided testimony before the Canadian Transport Commission to the effect that Staggers had often caused them to lose control of the routing to their consignees.¹⁷ This company however took the opposing view of corrective legislation which had been espoused by Union Carbide Canada, in that Canterra recommended that the Canadian railways be permitted to continue to set prices collectively. This position would also have distinguished the Canterra position from that of Canadian Superior Oil Limited in the sense that rebates by their very nature are meant to differentiate price. One could reasonably assume that since Canterra wanted the two Canadian railways to price collectively, the company would not have been in agreement with the Canadian Superior recommendation which would allow one railway to subvert the collective price-setting process by offering a secret incentive to certain Canadian shippers.

Canterra Energy also took an opposing tact to the position formulated by Alcan Smelters and Chemicals Ltd. by recommending that Canadian railways not be given the freedom, as had been done in the U.S. through the Staggers Act, of proceeding with line abandonments or route cancellations.¹⁸

Canterra had previously protested a route cancellation which was taken by CN in July 1983 in retaliation against the strategy of certain U.S. railways, such as the Burlington Northern and Conrail, to restrict their respective line utilization so as to retain only their longest hauls. The CN had thus cancelled its sulphur tariff from Western Canada to the U.S. via the Emerson, Manitoba border gateway (their shorthaul routing), thereby forcing shippers local to CN to use the gateway over International Falls, Minnesota, which thereby gave CN the longer haul. This decision by CN to "close" the Emerson border gateway had effectively prevented Canterra from using the Burlington Northern, whose lines connected there (see Charts V and XII(A)).

Canterra's lobbying position in favour of the Canadian government prohibiting by law any like route cancellations by Canadian railways in the future may not have been entirely well-founded for the following reasons:

1. The company could have contested the above-cited CN cancellation of the Emerson gateway by virtue of a public interest appeal within the existing 1967 legislation (Section 23, National

Transportation Act s.c. 1966-67, c.69) on the basis of commodity or regional discrimination.

2.The appearance that Canterra's objection to such route cancellations were within the best interests of Canadian export trade would have belied the fact that the company had traditionally preferred to shorthaul its product in Canada because mileage allowance (approved by the Association of American Railroads) was greater in the U.S. for the utilization of its privately-owned tank car fleet. ¹⁹

Perhaps a more persuasive strategy would have been for Canterra to alert the Canadian government that if certain U.S. railways continued to cancel their shorthaul transborder routings and Canadian railways were concurrently permitted to cancel some of their own, a point would inevitably be reached wherein shippers would not be able to use any gateway. This argument could then have led Canterra to conclude either that such an eventuality contravened the long established principle in Canadian law that shippers were entitled to joint international through rates, or that regulatory mechanisms be created which preserved a shipper's right to reasonably-priced proportional rates to and from the border. Moreover, the divergent protests by Canadian Superior Oil and Canterra Energy regarding rebate restrictions and route cancellations respectively appear to have constituted ineffective pressure group strategies in that they could have been countered by the Canadian railway lobbyists as being essentially contradictory policy solutions.

g) POTASH CORPORATION OF SASKATCHEWAN SALES LTD.

Whereas the effectiveness of the above presentations appears to have been limited due to their "one-issue focus", the CTC submission by the Potash Corporation of Saskatchewan (herein referred to as PCS) went to the other extreme. ²⁰ A brief description of this company's assessment of its exposure to revenue attrition was previously provided in Chapter 6(c). In providing the introductory framework for their recommendations, the PCS strategists elaborated the following views. Firstly, they stated that Canadian rail regulators had generally been guided according to the policy direction of their U.S. counterparts. They cited a conflict which had arisen in 1967 when both Canadian railways offered a published rate reduction for "heavy loading" of potash in covered hoppers from Saskatchewan to the United States. Several U.S. rail carriers predicted that the consequences of this Canadian rate reduction would be prejudicial to them and in consequence protested to the U.S. Interstate Commerce Commission

(ICC). The ICC subsequently ruled that this rate reduction or allowance was tied to a joint international rate which was within its relevant jurisdiction and, disallowed the Canadian discount.²¹

The interpretation given by PCS to this example of how U.S. transport regulators had historically "determined" Canadian policy is difficult to assess objectively. What is questionable from a strategic perspective, however, is the value of such an intervention, given the likelihood of its being viewed as a form of criticism of the Canadian bureaucrats whose influence was being sought with regard to the PCS recommendations.

The above-described rate dispute could equally well be argued as being less an example of Canadian regulators following the U.S. regulatory agency's lead, as it was of the difficulty of separating regulatory jurisdiction over transborder commercial activities. Indeed, the fact that the Canadian Transport Commission had for years approved of the maintenance of "parity" between certain Canadian international rates and competing U.S. domestic rates (see Chapter 10(e)) could equally have been deemed a reflection of the exposure of either country's regulatory jurisdiction of being undermined by shippers who were invariably prepared to shift their companies' traffic from a higher cost route to a lower cost route, if available. Given the unempirical nature of the PCS contention of U.S. transport policy leadership, as well as the absence of a necessary or irrefutable linkage to the company's recommendations, it appears to have been counterproductive to have included it in their submission.

The strategy of limiting government and public submissions to those arguments directly related to policy recommendations was also ignored in PCS' second argument. The company noted that substantial freight rate reduction on potash had occurred from 1980-1984, but were unable to estimate how much of this change was attributed to U.S. rail deregulation, as opposed to the economic recession allowing for low cost trans-Atlantic vessel movements, or to reduced Mississippi River barging rates being available due to marine carrier overcapacity.

Once again, this appears to be an extraneous comment which was not logically tied to PCS' subsequent policy conclusions. If the company was not prepared to demonstrate causality between Staggers and rate reductions, why should it have given its opponents the opportunity to use this evidence against PCS' recommendations? For example, the Canadian railways could have argued that since the benefits to potash shippers in the U.S. could well have been caused principally by the recession or by marine carrier overcapacity rather than by Staggers, why should the Canadian government assume that a deregulatory structure in Canada similar to that of Staggers (such as independent carrier pricing) would

necessarily lead to similar intra-modal competitive benefits?

A final example of the risks of including unnecessary opinion into public policy briefs may be found in the following statement:

"Neither railroad has agreed to these requests (for proportional rates) on the basis that they would likely lead to higher rates and would result in a lack of control of railroad equipment. We view the reluctance of the Canadian railroads to pursue a resolution of this conflict as an impediment to transborder trade. We also view the railroads' reluctance stemming from a fundamental difference of opinion on legislation regarding collective pricing. The railways appear to take the view that the permissive aspect of Section 279 of the Railway Act is a statement of public policy which encourages collective rate making. PCS Sales submits that this is not necessarily the case." ²²

Although this company's lobbyists demonstrated the most thorough research efforts of all the Canadian shippers who individually participated in the public inquiry process, they appear to have committed a tactical error in so attempting to prove that the existing Canadian legislation permitted independent railway pricing. They seem not to have asked themselves the question, "If the Canadian law, as it stands, already permits intramodal competition, why are we recommending that the legislation be changed so as to prohibit collective rate-making?" Even though these concepts are not mutually exclusive, they do point in opposing policy directions and this inconsistency could have been the unnecessary object of railway counter-arguments to the effect that changes to the law were not urgently needed if PCS had found it possible to operate satisfactorily within the existing legislative framework.

After having exposed these and other preliminary opinions, the company proposed the following specific recommendations:

- 1.The principle of contract confidentiality should not be qualified by having summaries of contracts made available publicly, as had been done in the United States.
- 2.Canadian railways should be given the legislative authority to surcharge transborder traffic.
- 3.The Canadian Transport Commission should explore the possibility of exempting transborder rail movements from all economic regulation.
- 4.The problem of the extraterritorial reach of the U.S. anti-trust laws would not apply to Canadian railways if they were to establish proportional rates on international traffic, rather than maintaining a joint through rate structure.

The uniqueness of these PCS policy recommendations made the company's submission unlikely to serve as a model for Canadian government analysts who were predictably searching for common denominators in shippers' strategies. The company's desire for absolute contract confidentiality as outlined in its first recommendation was dramatically underscored during the September 1984 CTC public hearings when PCS' traffic manager, Mr. A. Elliot admitted under cross-examination, to his company having accepted rebates from U.S. railways, but then refused to file these contracts with the Commission.²³ The fact that a shipper could so publicly admit to having contravened Section 381 of the Railway Act of Canada and not be threatened with prosecution constitutes a vivid demonstration of the CTC's weak enforcement role and the lack of seriousness with which both shippers and U.S. railways viewed the Canadian rail legislation's penalties.

However, the major difficulty with regard to which PCS should have anticipated its above-cited recommendation #1 was the likely opposition which many small and medium size shippers would demonstrate (as has been described in the Col-Pac Lumber example) if they could not receive some minimal information on their larger competitors' contracts with the railways.

The contract summaries which were required by virtue of the U.S. rail statute provided only a limited protection to any shippers wishing to question their competitors' contractual arrangements. This was in part due to the minimal information which was required by the U.S. legislation to be included in the publicly filed non-confidential summaries, as well as the paucity of ICC appeal opportunities which were permitted by virtue of the Staggers Act. Given the above, it may have served PCS' strategic objectives better to have withdrawn their first recommendation, since the existence of a summary which generalized the origin, destination, commodity classification and did not require divulging of the actual freight rate or rebate would not have caused a serious infringement of confidentiality.

The company's second recommendation to change the Canadian legislation so as to give the railways authority to surcharge transborder traffic was perhaps viewed within the corporation as consistent with its proposed agenda for comprehensive and bilateral shipper/railway deregulation. PCS was, on the one hand, requesting legislative freedoms which would enable it to negotiate freight rates without government intervention, as exemplified by public tariff filing requirements, and without the possibility of their competitors seeking rate equalization through a public interest appeal. Conversely, the company wished to extend like freedoms to the Canadian railways to cancel routes and surcharge transborder rail traffic, without the prospect of the regulatory agency intervening on behalf of a shipper's request through

the public interest mechanism.

Although the restriction of such surcharges being proposed only for transborder traffic in recommendation #2 appears inconsistent with PCS' concurrent proposal that independent railway pricing (recommendation #1) be required for both domestic as well as international traffic, the company was attempting to give the Canadian railways some degree of protection against the route cancellation strategies, already discussed, of U.S. rail carriers (see Chapter 3(b)).

The company should have anticipated that this recommendation would be regarded as extremist by the great majority of Canadian shippers who would not appreciate this "win-win" lobbying tactic, as it would have meant their being subjected to such surcharges. This second proposal thus further isolated PCS from the mainstream of Canadian shipper policy objectives which were directed toward giving the users of transportation service more, not fewer, recourses against the suppliers.

The third recommendation concerned the subject of exempt commodities, which, if implemented in Canada, would have harmonized Canada-U.S. regulatory treatment of certain traffic such as TOFC/COFC (piggyback), export grain and boxcar movements (See Chapter 4(e)). The fact that PCS was the only proponent of such an idea, of all the shippers participating in the CTC public inquiry process, may indicate that Canadian shippers were actually more in favour of increased regulation of railways as a strategy, than of co-ordinating the Canadian transportation policies with those of U.S. deregulation.

The fourth and final recommendation was linked directly to one of the proposals formulated by the Canadian railways which requested further government assistance in alleviating the exposure to U.S. anti-trust laws which their joint pricing practises had caused due to Staggers (see Chapter 4(c)). This recommendation appears to have been seriously flawed for two reasons. Firstly, the premise which PCS used in its argumentation was that the U.S. doctrine of anti-trust extraterritoriality could be circumvented by the establishment of single factor proportional rates from Canadian origins to the border.

However, the U.S. jurisprudence on extraterritoriality had frequently rendered foreign companies guilty of contravening the Sherman Act if the consequences of the collective pricing decision had an effect within the United States.²⁴ Indeed, the reason why CN and CP Rail had ceased participating in all joint pricing decisions on southbound transborder traffic was that they had little doubt but that any collusion on their part in this regard would have "an effect" on U.S. consignees and their markets, with the resulting U.S. anti-trust exposure. PCS seems to have been under a false impression that the nature of the illegality, as judicially determined within the anti-trust doctrine, was limited to collective discussion

on international through rates, as these latter rates "connected" the Canadian collusion with U.S. territorial jurisdiction. This conclusion was entirely unfounded in law.

The second weakness in PCS' final recommendation derives from a logical inconsistency. Why should the company be indirectly proposing that Canadian railways be allowed to conspire on proportional rates when it was in favour of independent railway pricing and had concurrently supported the abolition of Section 279 of the Railway Act, which section had permitted collective rate-making within Canada?

h) NOVACOR CHEMICALS LIMITED

In contrast to the highly untraditional yet well-documented policy position of PCS, the submission of Novacor Chemicals Ltd. of Calgary, Alberta and in particular its legislative recommendations, represented the general strategic direction of a great number of individual shippers.²⁵

Novacor was in favour of changing the Canadian railway law so as to permit confidential contracts for both domestic and international traffic. The company argued that it would be inequitable to move toward a more competitive railway environment which encompassed only international, but not domestic deregulation as well. Otherwise Canadian shippers producing goods for domestic markets which were also potentially served by U.S. shippers (variant to Hypothesis I) would be at a distinct disadvantage, since the latter group of competitors would benefit exclusively from rate confidentiality, rebates and a more competitive railway environment.

Novacor also recommended that a) the collective rate-making provisions of the Railway Act of Canada be abolished, b) the Canadian railways not be allowed to implement route closures arbitrarily, and c) rebating no longer be illegal in Canada. Thus, the company's proposed agenda for policy change took a polarized "win-lose" strategic tack in favour of shippers and against carriers' interests. Although this strategy ultimately proved to be successful and one should perhaps exercise caution when criticizing the "winning formula", one cannot but wonder whether policy formulation should in a general sense be so self-serving.

In addition to containing no compromise, the Novacor submission was weak due to its being logically inconsistent. On the one hand, the company was proposing a legislative environment which would be characterized by business relationships unimpeded by economic regulation, for example, confidential contracting and the receiving of rebates. On the other hand, Novacor was unwilling to concede similar business freedoms to its suppliers of transportation service; for example, they recommended that Canadian

railways be prohibited by regulation from being able to close their less profitable routes.

Moreover, the company may have exposed its proposals to unnecessary criticism (similar to the PCS submission) by stating extraneous opinions which were not directed toward building cohesive argumentation. For example, Novacor rejected the complaint by Canadian railways that the latter were suffering revenue attrition due to shorthauling. The company stated that because U.S. railways had traditionally paid significantly higher mileage compensation for shipper-supplied rail cars than that paid by Canadian railways,²⁶ this factor had contributed more significantly to shorthauling (see Chapter 3(b)) than the alleged impact of Staggers. Furthermore, they stated that on products with high ad valorem rates of duty wherein the U.S. freight component was non-dutiable, the Canadian shipper would have already been encouraged to increase the mileage within the U.S. in order to reduce the impact of the U.S. customs duty.

One can hardly envisage how the above arguments could be seen as assisting the company's objective of demonstrating that its recommendations for policy change were necessary due to the adverse effects of Staggers. As has been described in Part I, Novacor had outlined several perceived disadvantages which Canadian shippers were experiencing in competing with U.S. shippers due to the beneficial results of U.S. deregulation.²⁷

If the causes of shorthauling of Canadian railways had indeed been equipment compensation and/or ad valorem duties as Novacor argued, why then would the logical solution have been the freedom to contract, rebate and/or the prohibition of collective rate-making as Novacor was recommending, rather than alternate regulation pertaining to compensation and customs issues?

Lastly, Novacor stated that the Canadian railways had developed sufficient proprietary relationships with their respective U.S. subsidiaries and interlining counterparts in order to mitigate the effects of being shorthauled.

By so denying the validity of the Canadian railways' arguments of financial damage, Novacor was unintentionally contributing to the conclusion that serious and immediate changes to public transport policy were not warranted. A more effective strategy would perhaps have been to first accept that there were common areas of prejudice both to Canadian carriers as well as to shippers due to the impact of Staggers, and then argue why Novacor's proposals to attenuate the damage were preferable in the public interest. In this manner, the company could have used some of the railways' arguments to its advantage in confirming that a generalized problem existed which required the Canadian government's prioritized

attention.

i) NORANDA SALES CORPORATION

The final example of strategy selection by an individual shipper which shall be analyzed so as to test Hypotheses II and III respectively is that of the Noranda group of mining and forestry companies.²⁸ Noranda presented, in a direct and somewhat confrontational style, a series of recommendations which were characteristic of the "win-lose" structure. The company was in favour of modifications to Canadian rail legislation which would permit confidential contracts and rebates, both on domestic as well as on transborder traffic. The reasons given for having uniformly applicable regulation were distinct from other shippers' submissions which questioned, within an equitable framework, whether Canadian public policy should justifiably differentiate between classifications of shippers on the basis of their geographical markets. By contrast, Noranda queried whether it would be feasible to implement legislative changes which treated domestic traffic differently from Canada/U.S. traffic.

*"We doubt, however, if the U.S. movements without Canadian involvement can be totally separated. For example, a U.S. railroad reducing the divisional revenues of a Canadian railroad is indirectly receiving revenue for rebates from a Canadian source. Similarly, a Canadian line's U.S. subsidiary can pay higher than normal rebates through revenues received from the Canadian parent."*²⁹

This same argument could have been applied in a contrary sense to demonstrate that regulation concerning rebating and confidentiality was unnecessary given the apparent facility by connecting Canadian and U.S. railways to circumvent it. In other words, why logically should the Canadian legislation permit rebating, when rebates could already be given indirectly through a Canadian railway's U.S. subsidiary?

This possibility of the previous legislative requirements being undermined in practice should not necessarily have deterred Canadian policy makers from proceeding with the appropriate changes, due to the important directional role which regulation plays in society. Nevertheless, as with several of the other shippers' submissions which have already been discussed, one wonders whether the Noranda strategists fully contemplated the contrary usage which could have been given to their own argumentation.

Noranda also recommended that Canadian transport legislation be modified so that the railways be prohibited from cancelling or surcharging those routes which the carriers believed were not giving

them adequate revenues. Moreover, the company proposed that the interswitching zone³⁰ be extended so that the Canadian railway to which a plant were local would be obliged to transport the traffic of its customer to an interchange point served by a competing railway, at a statutory rate which was not fully compensatory.

Opponents of such a "win-lose" strategy could have argued that it was illogical for Noranda to want to have Canadian policy changed so as to conform to Staggers only in those select areas where it served the company's purposes. In Chapter 6, certain examples were described which inferred that U.S. mineral ore shippers were being advantaged in marketing their products due to the divergence between Canadian and U.S. rail legislation which had occurred as of 1980. If this were the case, why should the company be proposing modifications to Canadian law which were vastly dissimilar to the U.S. statutory model which had created such favourable consequences for their U.S. competitors? For example, obligatory interswitching was not included in Staggers, whereas the ability of railways to cancel routes and surcharge rates formed a part of the U.S. rail deregulation and was being rejected by the Noranda strategists.

One could postulate that in 1980, U.S. Congress achieved one policy objective by enacting legislation which encouraged U.S. railways to compete against one another through the prohibition of collective rate-making and the authorization of confidential contracts. Concurrently, the U.S. legislators met another critical policy goal of enabling these same carriers to become more efficient by permitting them to surcharge those rates and cancel those routes from which they derived insufficient revenues. The positive financial results which several U.S. railways experienced post-Staggers were usually characterized by the offsetting influence of both lowering the freight rates (through rebates), which encouraged more traffic, and the substantial lowering of infrastructural costs (through cancellations).³¹

By recommending legislative changes in Canada which would have met the first above-stated U.S. policy objective, but denied the second, Noranda appears to have been unwilling to recognize the necessary interrelationship between the two which had led to the improved U.S. rail transportation environment that the company wished to achieve for Canada.

Conclusions

The purpose of this chapter was, within the context of Hypotheses II and III which were being tested, to search for some commonalities of strategy selection among individual shippers in their respective

public response to the problem of transborder trade and traffic diversion, which has been examined at Hypothesis I. It was noted at the outset of this as well as of the previous chapter that very few individual shippers submitted reasoned representations concerning their proposals for policy change, perhaps due to fear of railway rate reprisals, rebate contraventions or the customary dominance of Canadian railway views in transport policy formulation. The nine individual companies examined were selected upon the basis that they were considered to be the most prominent and in depth positions within this pressure group which were publicly put forward.

If one were to review the policy recommendations of the individual shippers which have herein been analyzed, it would be most difficult to ascertain a common thread of regulatory proposal or strategy selection, other than the mutual desire in certain cases to change some facet of the national transport policy of Canada status quo. For example, whereas Canadian Superior Oil Limited proposed that confidential rebating be included in the new public policy, Col-Pac Lumber Company rejected the concept. Alcan Smelters and Chemicals Ltd. recommended a reconciliation between Canadian law and the existing U.S. rail legislation, which proposal was opposed by the policy initiatives formulated by Indusmin Ltd. The Potash Corporation of Saskatchewan strategists proposed that Canadian railways be given the legislative authority to surcharge transborder traffic and cancel routings, recommendations which were directly at odds with Novacor Chemicals Ltd.'s position. Moreover, Canterra Energy Ltd. had suggested that the Canadian railways be permitted to set freight rates collectively, an idea which constituted the very reverse of the policy formulation by both Union Carbide Canada Ltd. and Noranda Sales.

In reviewing Hypotheses II and III, it would appear that the public policy objectives of the individual shippers examined were diverse and among those companies whose goals were similar, the proposed regulatory modifications to achieve those objectives were often distinct.

Hypothesis II -That shippers would predictably seek greater competition between Canadian railways due to the expectation of lower freight rates and thus be in favour of new legislative measures similar to U.S. deregulation.

In assessing this hypothesis based upon the interventions of the shippers studied, it was found that Col-Pac, Indusmin and Canterra were not in favour of regulatory modifications which would stimulate greater competition between Canadian railways. Moreover those shippers in favour of intra-modal competition, such as PCS, Novacor and Noranda, were not in favour of legislative changes which were similar to U.S. deregulation. Only Alcan and Union Carbide selected strategic positions which would

have corroborated Hypothesis II.

Therefore, despite several of the nine shippers being in favour of Canadian legislation permitting confidential contracts and rebates similar to the changed U.S. environment, a full examination of their corporate policy recommendations demonstrates Hypothesis II to be invalid.

The apparent fact that there existed so little consensus upon such basic future policy issues would appear to give some credence to the supplementary conclusion that, alone, the submissions by individual shippers would not have achieved the necessary pressure upon government to change the Canadian legislation. By each company pursuing its own unique policy initiative, it would have taken little effort by some other pressure group, such as the Canadian railways, to sideline these shippers' strategic effectiveness by exposing their collective inconsistency and multi-directional contradiction.

Hypothesis III -That shippers would exhibit different strategic positions based upon their respective size, market share, or captive/competitive rail location, in that the larger and/or competitively located shipper would anticipate greater railway rate discounts and thus tend to be in favour of deregulation.

This hypothesis appears to be of greater general applicability, although a wider sampling of individual shipper opinion would have been required to reach definitive conclusions. Regarding the size factor, it was unfortunately the case that companies whose freight bills were below \$5 million per year rarely, if ever, participated in the public policy debates on Canadian rail legislation. Col-Pac, Indusmin and Canterra may well be characterized as "smaller" in transportation demand than the other shippers herein examined and may equally be seen as all being in favour of stringent railway regulation, but to conclude that they selected this strategy because they were small might be criticized as exhibiting a POST HOC ERGO PROPTER HOC weakness of logic.

The assumption that companies with greater market share would be in favour of minimal regulation as they would likely reap the benefits of contract confidentiality was tentatively borne out by the evidence at hand. Alcan is an excellent example confirming the above hypothesis, as this company had virtually no domestic competition and was in favour of a Canadian regulatory framework which limited government intervention. Similarly, PCS exhibited a high market share among potash producers and was in favour of minimal regulation. Conversely, Col-Pac had low market share and selected maximal regulatory recommendations in order to protect itself from the anticipated discriminatory freight rate rebates which would be offered to its dominant competitors.

With respect to the captive/competitive locational distinction, there appears to exist considerable strategic diversity within the sub-group of shippers examined who were served by only one Canadian railway (i.e. captive). Most of the companies studied, with the possible exceptions of Col-Pac and Alcan, were primary producers whose mines, drilling sites or lumber lots were in the distant and non-urban regions of Canada most likely to be captive to one rail carrier. There were very few, if any, secondary product manufacturers in the above sample whose factories would typically have been located near major markets in the larger population centers (for example, Toronto, Montreal, and Vancouver) which were accessed by both Canadian railways. Thus the competitively located sampling of individual shippers proved to be insufficient for purposes of empirical comparative study. Therefore, recognizing both the restricted number of companies herein examined when one further sub-divides them into small/large, captive/competitive subgroupings, as well as the lack of definitional precision regarding these classifications (see Chapter 8), it would appear that Hypothesis III has been demonstrated to be tentatively established.

Of the nine individual shippers selected for strategic analysis, Union Carbide Canada Ltd. was the only subsidiary of a U.S. multinational. This Canadian subsidiary did prove to be in favour of policy reform along lines virtually identical to the changes in U.S. rail legislation. It is recognized that this sample of U.S. subsidiary behaviour is insufficient to derive meaningful conclusions to the variant to Hypothesis III that shippers which were the Canadian subsidiaries of U.S. multinational firms would be more likely to be in favour of policy reform similar to Staggers. Of interest, Alcan, a Canadian multinational with U.S. subsidiaries also recommended a pro-Staggers transport policy for Canada based upon its U.S. corporate experience.

With regard to the other variant of Hypothesis III, that individual shippers would formulate recommendations which would encompass both their own economic interests as well as those of the railways (Win-Win Strategy), rather than displaying a self-serving and antagonistic lobbying position (Win-Lose Strategy), this could not be confirmed due to the extreme diversity of transport policy orientations adopted by individual shippers. The submissions of PCS and Alcan proved to be valid examples of Win-Win Strategy formulation. By contrast, the Novacor and Noranda positions constituted evidence of Win-Lose Strategy. It was perhaps this autonomous and non-consensual strategic behaviour which deprived this pressure group of individual shippers from attaining the full impact of their recommendations upon the Canadian government decision-makers.

Chapter 10:

SHIPPERS' ASSOCIATIONS - ANALYSIS OF STRATEGY SELECTION AND POLICY RECOMMENDATIONS

Introduction

The second classification of pressure group to be examined in relation to how its members strategically responded to the problem which was tested in Hypothesis I, are shippers' associations. There were two preliminary assumptions which were questioned before a formal hypothesis regarding this group could be properly evaluated.

Firstly, in acknowledging that these entities had a bona fide role to play in affecting the determination of public policy, was it reasonable to assume that such associations were representing the views of their respective corporate memberships. The portrayal of such lobbying organizations as self-declared agents for their particular industry's public policy views was dependent upon the notion that the opinions of the membership are both being sought and represented. If an association consisting of one hundred companies were in fact representing the views of only a few members, upon what basis could the government justifiably deem this pressure group's submissions as fully representative of that industry sector?

Secondly, would the policy recommendations of the shippers' associations be similar to the public submissions of the individual shipper category, or any differences attributed to the more formal structure or divergent goals of the associations? Given that the associations were prima facie mandated organizations of individual shippers, would it not be reasonable to assume that a similar variance of opinion which had been evidenced in Chapter 9 would be reflected in the policy positions advanced by the associations? Otherwise, Hypothesis II and III would have to be re-tested for this classification of pressure group as well, which was deemed a repetitive and less useful process than focussing upon a new and distinct

22. *Op. cit.*, PCS Sales Submission, Section 2.13.
23. CTC public hearings into impact of U.S. deregulation, Montreal, September, 1984.
24. See endnote #21, Part I. Judge Learned Hand formulated this "intended effects" theory in the Alcoa case (148 F.2d 416 2nd CIR. 1945).
25. Submission to Railway Transport Committee of CTC re: *Inquiry on Impact of U.S. Deregulation on Canadian Shippers and Carriers* presented by Mr. R.A. Burns, Manager, Distribution, October 4, 1984 and interviews with Mr. R. Burns and Mr. D. Freeman, traffic managers, in Edmonton, March 1988. I also interviewed Mr. Burns several times in 1987 as he was one of the witnesses for the Coalition of Concerned Shippers' presentation to the House of Commons during the Parliamentary hearings into Bill C-18, wherein I acted as legal counsel.
26. *Supra*, endnote #19, Part II.
27. *Supra*, Part I, Chapter 6 (d).
28. Submission by Noranda Sales Corporation (the marketing agency for Noranda's mining and metallurgical divisions), re: *Inquiry on Implications of U.S. Rail Deregulation for Canadian Railways and Shippers*, Railway Transport Committee, CTC, at Toronto, Oct. 1, 1984 presented by Mr. M.J. Buller, Manager, Transportation Services. Separate interviews were also conducted with Mr. D. Spearin, Manager, International Transportation, Mr. C. Hibbelin, Vice-President, Transportation, Mining Products, Mr. K. Porter, General Manager, Traffic Noranda Sales, Mr. D. Hall, Manager, and Mr. D. McEnroy, Vice-President, Noranda Forest Ltd. and Mr. R. Anderson, Traffic Manager, Canadian Electrolytic Zinc, a Noranda subsidiary, in 1987 and 1988 in Toronto, Montreal and Valleyfield respectively.
29. *Supra*, submission of Noranda Sales Corporation, Oct. 1, 1984 at page 8.
30. *Infra*, endnote #116, Part II.
31. *Infra*, endnote #128, Part II.

Chapter 10:

SHIPPERS' ASSOCIATIONS - ANALYSIS OF STRATEGY SELECTION AND POLICY RECOMMENDATIONS

Introduction

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Hypothesis IV. If this second assumption did not prove to be well founded, was the diversity exhibited in the often irreconcilable strategies of the above shippers' submissions a direct function of the individual nature of corporate lobbying presentations, in contrast to the unifying role played by industry associations?

Once these two preliminary assumptions have been assessed, the objective of this chapter is to discern and evaluate the process of dynamic strategy selection among Canadian shippers' associations between 1983-1987. The following hypothesis will be tested in relation to the recommendations within this pressure group to resolve the problem of transborder traffic diversion (see Part I) by the proposed modification Canada's national transport policy.

Hypothesis IV -That shippers' associations would work together in order to present the government with a common set of policy plans, so as to achieve a cohesive lobbying approach, rather than permit regional base differences or inter-group competition to lead to significant strategic disparity.

The logical underpinning of this hypothesis was that this constituency would predictably attempt to avoid the dilution of its impact upon the Canadian government by co-ordinating the recommendations of the various industry associations. Otherwise, the Manufacturers Association would potentially counteract the policy recommendations of the Chemical Producer Association and their respective strategic plans would both be of nominal effectiveness. Conversely, would the determination of each group to fulfil its particular mandate in a visible (and self-justificatory) manner lead to resistance against policy consensus-building? This postulate constitutes the principle test by which each of the seven selected major Canadian shippers' associations were evaluated.

A variant of Hypothesis IV is that the shippers' association(s) which took the greatest degree of leadership in the policy debate would be the most effective in the context of the ultimate legislative outcome.

Were those associations which became prominent in the public policy discussions which were encouraged by the Canadian government more likely to be rewarded by their proposals being included in the remedial legislation? Was it reasonable to postulate that the association which was perceived by the government decision-makers as leading the industry sector would be given greater consideration than those associations which were less visible or prone to group coalition.

a) LACK OF TRADITIONAL COOPERATION AMONG SHIPPERS' ASSOCIATIONS

The above-cited policy recommendations by individual shippers were particularly instructive as they demonstrate the diversity of unabridged views similar to those which the professional lobbying associations had to mold into a logically consistent and strategically unified series of legislative proposals.³²

This mandate was all the more challenging in the early 1980's due to the existence of as many as twenty distinct industry associations in Canada and their not having customarily worked in unison on policy formulation.

This lack of co-operative experience in strategic planning was due to some of the following factors:

- 1) As adherence to these associations was voluntary, many of these entities perceived themselves as being in competition with one another. For example, it would be possible for one shipper to have concurrently been a member of the Toronto Board of Trade, the Canadian Manufacturers' Association, the Canadian Pulp and Paper Association, and the Canadian Industrial Transportation League.
- 2) Several of the associations were industry specific or regionally based and would not typically have had much in common with groups representing other industries or regions. For example, the Canadian Mining Association may not have had an affinity of interest with the Canadian Retail Shippers' Association.
- 3) Due to the historical acceptance by shippers of the dominant role in transport policy formulation by Canadian railways, the professional lobbying associations were unaccustomed to initiating or progressing their own collective recommendations for legislative change.

In order to respond to the question of how such associations could have in the past justified their members' expectations without forcefully lobbying for change in transport policy, it should be noted that the mandates of these entities frequently extended beyond transportation issues, as well as beyond the lobbying function. Thus, the Coal Association of Canada would have pursued a variety of government-related activities, directed by corporate members which would have channelled their efforts into several committees, of which the transportation committee was only one. Other committees would have included those of a technical nature (such as environment) and those related to government areas other than

transport (such as trade policy). As transport issues were generally perceived by industry as having a less significant impact upon costs than fiscal or labour policies, it is not surprising that the transportation committees of many shippers' associations shared a somewhat diminutive profile.

Even for those few associations whose primary purpose was transportation, as acknowledged by their charter (Canadian Industrial Transportation League), by the function of actual negotiation of freight rates by their traffic committee (Canadian National Millers' Association), or by the significant role which rates played in the overall costs of certain bulk commodities (Potash Producers of Saskatchewan), the lobbying function may still have occupied a peripheral position in comparison to other activities such as the interchange of information through meetings, annual conventions, seminars and newsletters.

b) INTERRELATIONSHIP BETWEEN SHIPPERS' ASSOCIATIONS AND FEDERAL GOVERNMENT

The above-stated activity of internal communication with membership prompted the Canadian government to use these associations as vehicles of convenience for the consultation process, with regard to formative policy assessment by industry.

It was the practise of Transport Canada and the Canadian Transport Commission to send their respective discussion papers on proposed regulatory change to these twenty Canadian shippers' associations, perhaps in the overly confident belief that this was an adequate manner of requesting feedback from the parties affected by the policy under review. No attempt was made by the federal government to elicit a participatory response from a wider sampling of individual manufacturers and producers, as this was perceived as a too involved, unwieldy and perhaps discriminatory (due to an arbitrary selection of shippers) process.

One striking weakness of the above-described Canadian government practise of shipper "containment" is that even if one were to admit that a majority of rail shippers were members respectively of at least one association, the group dynamics would make it unlikely that many of them would be active participants in the particular industry transportation committee. Thus, in the CTC's receiving a written response from the Canadian Importers' Association, for example, it is predictable that only a handful of the thousands of members would have been polled or even have been aware of their association's policy statement on a particular transport-related issue.

Although it may have appeared expeditious for the Canadian government to have restricted its

industry consultation process to shippers' associations, this customary approach may have been significantly lacking in its actual representative quality and depth.³³

c) ATLANTIC PROVINCES TRANSPORTATION COMMISSION

The Atlantic Provinces Transportation Commission (herein referred as APTC) represented shippers from the four Canadian maritime provinces and were acknowledged as being an important regional lobbying association.³⁴ It was contended in the public submission to the CTC that although this association continued to be in favour of a bi-national system of published joint international through rates, their membership recognized that the development of U.S. confidential contracts and rebates had improved the relative competitive position of shippers in the United States over that of corresponding industries in the Atlantic provinces. In consequence, the APTC recommended that Canadian shippers and railways be permitted to enter into similar confidential contract arrangements, but only with respect to southbound Canada-to-U.S. movements.

It would appear that the above proposal was based upon the belief that U.S. deregulation could and should be contained in terms of its impact upon the Canadian railway legislative environment, except where strictly necessary to protect the interests of Canadian Atlantic shippers. Implicit in this belief was the sentiment that the Canadian regulatory status quo was preferable to the transport policy changes which had occurred in the U.S. since the enactment of Staggers (in opposition to Hypothesis II). One may thus observe a basic distinction between the APTC, whose predisposition was to maintain the Canadian legislation, and a number of individual shippers (see Chapter 9 re PCS, Novacor, Noranda) whose objectives were to change one or several facets of the law.

Some further observations may be made regarding APTC's recommendation to allow for confidential contracting on southbound transborder movements, but not on northbound or import movements. Firstly, as this solution would invariably lead to differentiated regulatory treatment as between Canadian importers and exporters, how could the APTC have expected the government to respond to allegations that importers were being disfavoured? Secondly, this recommendation appears to be in some contradiction with the following APTC statement to the effect that U.S. ports should not be preferred over Canadian Atlantic ports as a consequence of transport policy decisions of the Canadian government:

The APTC sees the distinct possibility that, if confidential rate contracts on rail traffic from

*Canada to the United States (or vice versa) were to be permitted on the through movements, the Canadian ports of Halifax, Saint John, and Montreal would be placed in an unfavourable position in competing for Canadian export or import traffic moving to off-shore markets via United States ports.*³⁵

Aside from the logical inconsistency regarding Canada to U.S. movements in that the above quotation opposes confidential contracting, whereas their own concurrent recommendation favoured such a provision, one may also question whether the APTC proposal relating to maintained rate transparency on off-shore import/export traffic would have achieved the association's objective of international port parity.

Consider the example of Volkswagen Canada Ltd., whose imported vehicle and automotive parts traffic for the Canadian market accounted for approximately \$6.2 million being paid to CN Rail in 1987 for rail movements via the entry Port of Halifax, Nova Scotia to various destinations in Canada.³⁶ The ships originating in Europe containing Volkswagen vehicles for North America regularly stopped at six to eight ports on the east and west coasts of North America, Halifax being the only Canadian point of entry. In order to save on transit time, wharfage and port handling costs, Volkswagen headquarters in Germany decided in 1988 that it would be more efficient to reduce the overall number of North American ports of entry. Concurrent with this internal corporate decision, Conrail proposed favourable rate levels to Volkswagen from either the entry Port of Wilmington, Virginia or Port Elizabeth, New Jersey, with beyond routing to Montreal and Toronto destinations. Had Volkswagen accepted Conrail's offer, CN would have lost most of its revenue from this account, given the displacement of its Canadian captive port (Halifax) for a U.S. port served by Conrail.

This demonstrates the high degree of demand sensitivity of import/export traffic to diverse port routing decisions which would substantially affect the long-haul revenues of certain Canadian or U.S. railways, similar in nature to the north/south transborder diversion examples which have been described in Part I.

Also of relevance is the combination of factors, which may cumulatively be seen to determine the traffic manager's decision to select one routing over another. Taking the Volkswagen case as typical of larger Canadian importing firms, the routing selection would have been subject to the following considerations:

IN FAVOUR OF PORT OF HALIFAX, NOVA SCOTIA

1. Canadian traffic manager retains complete control over decisions relating to vehicles without having to share responsibility with much larger volumes of Volkswagen U.S. traffic manager.
2. The known working relationships with CN Rail personnel and Halifax Autoport refitting operations (ex. dewaxing), as opposed to the yet untested Conrail and U.S. port performance.
3. Fewer delays due to one international customs entry, rather than two.

IN FAVOUR OF PORT OF WILMINGTON, VIRGINIA

1. The decision by Canadian traffic manager to follow Volkswagen, Germany's suggestion toward consolidation of Northeastern traffic may enhance his corporate profile due to "co-operative" attitude.
2. The knowledge by CN Rail that Volkswagen has actually diverted traffic away from Halifax may lead to renewed efforts by the Canadian railway to be more price competitive upon U.S. railway contract expiry.
3. Working with more innovative and marketing-oriented U.S. railways, with greater likelihood of rebates being extended as a matter of course, rather than by exception.

If one were to include such additional comparative considerations as equipment, transit times, liability, and rate comparisons, the dimension of contract confidentiality may not appear to have a preponderant significance in the ultimate decision.

Nevertheless, traffic managers were frequently less concerned regarding their product's actual rate levels than with comparison as between their company's transportation charges relative to those paid by their competitors. Thus, assuming that the Canadian railway legislation would not have changed regarding northbound or import traffic regulation (as APTC had recommended), it is possible that Volkswagen Canada would have preferred confidential rates with Conrail (via Wilmington) rather than have its smaller competitors, Mercedes, Jaguar, BMW and Saab-Scania, become aware of an open tariff with CN Rail (via Halifax) and subsequently put pressure upon CN to equalize any such transport rate discounts.

Therefore, by proposing that import traffic not benefit from confidential contracting, the APTC strategy may well have led to the eventual loss of traffic from the Port of Halifax to competing U.S. ports, the very opposite consequence which this association had intended its recommendation to achieve.

Similarly, by restricting its proposals of harmonizing the existing Canadian transport policy with U.S. deregulation changes only as it related to Canada to U.S. southbound traffic, the APTC may also have inadvertently deprived Atlantic member shippers of opportunities with regard to their domestic

Canadian markets. As has previously been noted (see variant of Hypothesis I), many domestic Canadian consignees could equally well be supplied by the U.S. consignors as by Canadian ones. If these U.S. producers had lower prices due to Staggers, they could effectively compete for Canadian domestic markets through discounted northbound transborder rates.

Finally, the APTC recommended that the transport legislation be changed so as to enable CP Rail to run its trains over CN trackage in order to provide the Port of Halifax with competitive rail options. This proposal was unnecessary, since the association was evidently unaware that such statutory provisions already existed in Section 331 of the Railway Act of Canada.³⁷ Furthermore, this proposal may have been unproductive in the sense that enabling the Canadian railways to apply for joint track usage would not necessarily have prompted them to change their customary co-operative market sharing practices nor to embark upon a program of active price competition.

What is perhaps more interesting with regard to this recommendation is that it demonstrates the internal and potentially divisive pressures with which each industry association must come to terms. This proposal for joint running rights, however inappropriate in a legal sense, would have been favoured by the Halifax membership of the APTC, which had argued that since their port was captive to only one railroad, deregulation in Canada could be detrimental to its economy due to the absence of competitive pressures on the inland rail route to which it was dependent,³⁸ as compared to other ports which were situated with access to two or more railways, such as Montreal or Vancouver. By contrast, Saint John, New Brunswick, an Atlantic Canadian city which had competitive rail access, and another APTC constituent, would have been opposed to its association's same proposal, since this would have unilaterally assisted a competing port in close proximity.

The ultimate decision to recommend a policy change (regarding joint track usage) which would have improved the competitive position of one contingent of its members over another thus belies the trade-offs which had to be conceded to the Saint John, N.B. faction by the APTC executive in order to offset its possible alienation from the association's leadership.

What appears more remarkable in the light of the developments which transpired after the Canadian resolutory legislation was enacted in 1987-88, is that the fundamental premise of the APTC proposal for joint track usage, i.e., that competitively situated shippers would benefit from greater rate reductions than those located at a rail captive port, was proven inaccurate. As will be noted in Part III of this thesis, many shippers captive to Halifax (for example, Potacan, Atlantic Packaging, Lantic Sugar)

received high levels of contract rebates in 1988 from CN Rail even though there was no realistic threat of competition from CP Rail. These discounts were as substantive as those given by CN to shippers situated at points served by both itself as well as a competing railway (i.e. competitively-situated shippers) and appear to indicate a corporate plan to give equivalent rate reductions to all major CN customers, irrespective of location (see Charts XXXIII and XXXIV). The internal corporate objective of CN to be seen as complying with the new federal legislation, apparently took priority over what the APTC assumed would be the railway's predictable inclination to have its rates to captive customers cross-subsidize marginal revenue returns from shippers at competitive locations.

d) BOARD OF TRADE OF METROPOLITAN TORONTO

Another example of an industry association attempting to select a strategy which would concurrently represent, as well as lead, a widely divergent membership, some of opposing interests, was the Board of Trade of Metropolitan Toronto. The Board provided an excellent example of what was described earlier as a "vehicle of convenience" for the polling and influencing of policy formulation. The weakness in representativity was reflected in its structure - a membership of 15,000 contrasted by a transportation committee of 10, of whom only 4 or 5 were actively interested in rail policy issues. The Board was perceived as an entity consistently "friendly" to the interests of the Canadian railways and one which could generally be counted upon for endorsement of railway-oriented positions, or in the alternative, neutrality.

Of the possible reasons for the Board's co-operative disposition with regard to railway lobbying efforts:

- a) CP Rail and CN Rail marketing managers were included in the handful of active participants in the Board's Transportation Committee. As this small transportation policy group had participated in industry-related social events for many years, the shipper members were likely not to take a position antagonistic to the railway members.
- b) The full-time staff of the Board did not provide direction or separate input into the Transportation Committee's deliberations. This was due to the association's decentralized structure wherein there existed several such committees for the Board's staff to supervise in addition to their other activities such as organizing golf tournaments and maintaining a business dining facility, private club and convention hall for members.
- c) The selection of any new member of the Transportation Committee was recommended and vetted

by the above-mentioned 4-5 active members, who also drafted any of the transport policy positions, which, once approved by the committee, went out under the name and auspices of the Toronto Board of Trade after only a cursory review.³⁹

An analysis of this association's public inquiry recommendations appears to reflect the inclusion of both shipper and railway representatives within their Transportation Committee.⁴⁰ For example, the Board stated that Canadian shippers wished to take advantage of the rebating opportunities which existed in the United States. Furthermore, it was in favour of changes to the Canadian railway law which would give shippers greater rate options due to intramodal competition. In citing its frustration over rail rebates being given to U.S. receivers of the members' products, as well as the competitive advantages of the IMC K-train experience,⁴¹ one may assume that this pro-competitive policy position was formulated by the "shipper contingent" within the Board's Transportation Committee.

Conversely, the Board also recommended that public rate filing be continued by the railways and that collective rate-making be maintained on certain kinds of tariffs. It is predictable that this strategy derived from the railway membership within the Committee.

One major weakness with the Board's submission was that these divergent recommendations of its two membership factions were nowhere reconciled.

The Board explained that although Canadian railway management were capable business people in a mature industry, the obligation to file rates would moderate any tendency toward "excesses of any kind in pricing". This component of the Board's submission may well have been derived from the CP Rail Committee member who was reflecting his company's concern over the threat of an intramodal price war. Indeed, in a subsequent part of the submission, a concern was expressed that fair competition might not be possible as between privately-owned CP Rail and government-owned CN, the latter having "*a greater measure of funding accessibility and not being subject to the same financial restrictions as a corporation in the private sector*".

It has previously been mentioned that the strategies of certain individual shippers, such as Noranda Sales Corporation, were perhaps less effective because their recommendations were so self-serving. Such shippers would predictably have responded to the Board's concern over a possible price war by questioning why shippers should oppose such pricing excesses, given that they would be the beneficiaries, at least in the short-term.

Although it is commendable that the Board's submission by contrast to Noranda's approach, contains recommendations which would benefit both shippers and railways (Win-Win Strategy), what is missing is that these differently-intended proposals were not consistent and did not lead to a common set of policy goals. Furthermore, the logic and cohesion of several of the Board's arguments do not appear to have been adequately pre-examined.

For example, the Board proposed seemingly irreconcilable concepts of secret rebating and rate publication, without offering any explanation of how the two regulatory propositions could co-exist. Indeed, it was submitted that rate transparency would protect shippers located in more remote northern regions, as well as prevent the occurrence of negative competition between railways. These recommendations establish the policy objective that railways should compete only moderately against one another, avoiding the afore-mentioned "pricing excesses", yet no substantiation was given as to how these proposals were specifically destined to achieve the Board's goal of restraining the degree of competitive intensity between Canadian railways. Similarly, the logic of relating rate publication to the objective of ensuring that northern Ontario (i.e. captive) shippers received equitable rate levels as compared with metropolitan Toronto (i.e. competitively located) shippers, which were perhaps already receiving rebates from deregulated U.S. railways remains far from clear.

Lastly, the Board's proposal to maintain collective rate-making only on certain types of rates may have led, had it been implemented by the government, to regulatory inconsistency and ineffective policy making.

e) COUNCIL OF FOREST INDUSTRIES OF BRITISH COLUMBIA

The Council of Forest Industries of British Columbia (herein referred as COFI) was recognized as a prominent industry association representing shippers of one of Canada's major export commodities - lumber (kiln-dried spruce, fir, cedar, pine, woodchips, dimensional timber, and plywood). The Council represented 120 member companies whose lumber production accounted for approximately 90% of the B.C. industry's total sales. This volume meant an overall demand for 220,000 rail carloads of lumber in 1983, the majority of which were destined for the northeastern and southeastern U.S. housing markets.⁴²

There were a few notable differences between the respective membership configurations of the Board of Trade of Metropolitan Toronto and the Council:

1. The Board's Transportation Committee was comprised of many shippers who were primarily

involved with truck transport, whereas the Council's membership were uniformly concerned with rail policy issues, due to the inherent cost advantages which the rail mode possessed for long distance surface transport regarding forest products (ex. trip length exceeding 1000 km).

2. The product mix produced by Board members typically was comprised of manufactured goods, whereas the Council's commodities were of a bulk nature. This factor probably accounted for a heightened interest in transportation costs by Council membership, given that the freight rates represented a more significant portion of the market value of the goods.

3. Whereas it has been mentioned that the Board's Transport Committee membership were generally predisposed to accommodating themselves to Canadian railway proposals, this would have been the opposite case with respect to the Council. This difference in attitude may be a reflection of the following elements:

a) The Council's Transportation Committee included no railway representatives.

b) The Council had for many years collectively negotiated for an industry-wide rate category known as agreed charges with the railways annually for freight rates and were therefore accustomed to seeing themselves in an opposing position to that of the rail carriers.

c) Whereas the Board did not designate full-time staff members to work exclusively on behalf of their Transportation Committee, the Council's structure included a vice-president exclusively responsible for transportation.

d) The self-image of the Council was that of a regionally-based group of bulk resource commodities. There existed among Council membership the generalized belief that transport regulatory policy had traditionally benefitted Ontario and Quebec manufacturers which were, in any event, less distant from their respective markets and thus less dependant upon rail transportation service. This quasi-antagonism toward "the East" wherein the federal seat of government was situated, pervaded the Council's lobbying attitudes and resulted in a predictably "isolationist" self-identity.⁴³

The strategy and policy recommendations formulated by COFI appear to reflect the significant diversity of its membership in terms of respective volume, proximity to the U.S. border, access to one or more railways, as well as the predictable uncertainty of modifying the regulatory status quo. This situational divergence was rendered all the more prominent by the fact that some of the member lumber mills were located on the rail lines of British Columbia Railway (herein referred as BCOR) which was

subject exclusively to provincial, not federal, regulation. Thus, COFI's recommendations to amend the National Transport Act of Canada, 1967 so as to include extended interswitching, contract appeals, or rate arbitration would not benefit that part of its membership which were local to the BCOL or at best would affect their movements only for that portion of trackage which was subsequently interchanged between the BCOL and one of the federally-regulated carriers. This lack of homogeneity among members posed an additional burden upon COFI staff to both achieve consensus and have the association assume a leadership role in pressuring the government for change.

Initially, COFI was opposed to permitting Canadian rail carriers to enter into confidential contracts with shippers. The association submitted that rate confidentiality by its very nature would "breed discrimination"⁴⁴. COFI recommended in the alternative that Canadian railways continue to be required to file all rates with the Canadian Transport Commission. Many of COFI's members were small operations or had mills at relatively isolated and non-competitive rail points, and hence lacked the ability to exert competitive pressure upon the market. The filing and publication of rates was thus viewed as an effective safeguard in protecting these small or distant shippers from the dominant negotiating power of the Canadian railroads and the pricing practices of major lumber shippers.

The Council did not seem to recognize the inherent contradiction between some of its members having accepted rebates deriving from U.S. confidential contracts and the association concurrently proposing that all rates be publicly filed in Canada. As has been stated previously, many Canadian shippers were already receiving secret rebates either directly from U.S. railways or indirectly from Canadian railways accepting reduced revenue divisions from U.S. connecting railways.⁴⁵

The Council subsequently retracted its position opposing confidential contracts. This may have been due to the realization that in order to effectively lobby the government for such legislative changes as final offer arbitration and competitive joint line rates (both concepts to be described in Part III), the association could not be out of step with the mainstream of Canadian shipper pressure groups.

Moreover, it may have been inconsistent for COFI to have been favourably inclined toward the authorization by the ICC of U.S. railway mergers since the enactment of Staggers, as was manifested in the association's CTC submission. The association submitted that such mergers, in combination with the ICC's approval of blanket route cancellations (see Chapter 5(b)) by certain U.S. railways (such as Conrail and BN), had resulted in a greater availability within the U.S. of single-line rates and in shortened transit times respectively. The appropriateness of such a statement is indeed questionable given that COFI would

have opposed any similar route closures or mergers among Canadian railways.

Yet another example of formulating assessments without sufficient prior analysis and which could be deemed counter-productive toward the association's strategic objectives was COFI's statement that the Canadian railways were unable to maintain rate parity.⁴⁶

As has been explained at Chapter 2(c), British Columbia lumber producers compete directly against mills in the U.S. Pacific Northwest (States of Washington and Oregon) for markets in the Northeastern U.S. The rail mileages as between Seattle, Washington, or from Prince George, B.C. respectively to Chicago, Illinois are approximately the same and parallel pricing structures had historically been established through the mechanisms of regional rate bureau, such that the transport charges from either Canadian or U.S. western origins were customarily identical. Several COFI members had in 1977 embarked upon a major public interest appeal before the CTC as well as a civil court action claiming millions of dollars of damages due to the Canadian railways having introduced transcontinental rate increases which were not matched by competing U.S. railways.⁴⁷ The CTC had subsequently ordered the Canadian railways to re-establish parity and the latter had surprisingly refused to comply on the basis that the existence of U.S. confidential contracts prevented them from knowing the precise U.S. rail rates which they were obliged to equalize.

By unintentionally confirming in their 1984 CTC submission that the Canadian railways were indeed incapable of maintaining rate parity, the Council may have jeopardized its members' case requesting monetary damages which was being considered by the civil court.

If one were to speculate on how such a serious mistake in strategic planning could have gone unnoticed, one might conclude that the voluntary nature of such pressure groups appears to foster a less critical attitude toward the vetting and co-ordination of policy pronouncements than within individual corporate members, with a lesser accompanying degree of responsibility for error.

There were two final points in the COFI submission which merit discussion. Firstly, the Council stated that U.S. interstate trucking deregulation, which had been enacted in 1980, had assisted U.S. Pacific Northwest lumber shippers in their Trailer On Flat Car (TOFC) piggyback movements railed to Chicago and trucked beyond. Although it is factual that low motor carrier rates existed in the U.S. due to the entry of many thousands of new or expanded trucking firms,⁴⁸ the Council appears to have been unprepared for the possibility that what it perceived to be an extraneous factor could have been employed by others to refute COFI's own strategic objectives. For example, Canadian railway lobbyists subsequently con-

tested the Council's rail policy recommendations toward greater intramodal rail competition on the grounds that the erosion of Canadian lumber markets would not be effectively curtailed without concurrent legislative modifications to Canada's trucking regulations. Due to the delegation of constitutional jurisdiction over extraprovincial trucking by Canada's federal government to provincial governments in 1954, it may not have been politically feasible for the Canadian government to have jointly addressed both rail and motor carrier regulatory reform, which would have confirmed the above counter-strategic arguments to the effect that COFI's proposals, if implemented, would only constitute a partial and thus ineffective solution to the problem of transborder diversion.

Secondly, in their October 1984 submission to the CTC,⁴⁹ COFI stated that they would be in favour of the Canadian railways receiving statutory exemption from the extraterritorial reach of the U.S. anti-trust laws, on condition that the Council's recommendations for rate arbitration and reparations were accepted by the government.

At first glance, this novel approach of suggesting a policy "trade-off" may appear to indicate a willingness to arrive at a compromise solution involving opposing recommendations of Canadian railways and shippers respectively. However, this strategy also possessed certain weaknesses. For example, it was the U.S. government, not the Canadian, which had the authority to grant the relevant anti-trust exemption. Thus COFI's proposal was apparently made to the wrong party. Moreover, it may have been more effective to have achieved this compromise with the railways beforehand, so that the latter in their submissions would have also confirmed being prepared to accept arbitration and reparations. To state, as the Council did, that the membership were in ordinary circumstances against railway anti-trust exemption, but would accept it on certain pre-defined conditions, could be seen as demonstrating at the outset a wavering attitude toward this policy issue.

f) CANADIAN INDUSTRIAL TRANSPORTATION LEAGUE

Whereas the Board of Trade's strategy may be termed "railway-friendly", and the Council of Forest Industries' contrasting policy stance, "railway-adverse", the next pressure group to be discussed experienced a remarkable transformation from the former to the latter status during the period of government consultation regarding the diversion of transborder traffic. This turnaround is of relevance academically as it may indicate that effective lobbying strategies tend to require polarization or alternatively, that the appearance of polarity may be necessary for a pressure group to achieve a position of leadership among

similarly-based associations.

The group in question was the Canadian Industrial Transportation League (herein referred as CITL), which unlike the APTC, COFI or the Board of Trade, had a charter and agenda which were exclusively oriented toward transportation issues. Membership in the CITL was restricted solely to shippers, i.e., actual users of carrier freight services.

In reviewing the files of the Canadian Transport Commission, one notices a striking difference in strategic approach adopted by the CITL between the initial interview with CTC investigators Graham and Russel in September 1983, and the association's public inquiry submission one year later.

During the 1983 interview, the CITL took the position of asking the CTC for guidance on policy, rather than attempting itself to guide the federal government. Instead of formulating specific recommendations regarding regulatory changes, the association manifested several concerns of a theoretical nature. By not establishing a precise and cohesive lobbying agenda, the CITL may have initially minimized its impact upon the outcome of the legislative process and relinquished its leadership role among Canadian shipper pressure groups to those which would have already focused upon the specific policy directions which they had determined to be in their members' best interests.

For example, in the September 1983 interview with the CTC,⁵⁰ it was recorded that the CITL were concerned as to what would happen if the Canadian transport legislation were first deregulated in order to harmonize itself with Staggers, and then the U.S. law would be subsequently modified in a re-regulatory pattern. Similarly, the CITL executive told the CTC investigators of their interest in how the railway mergers which were occurring in the United States would ultimately affect U.S. shippers, which might eventually be subject to oligopolistic pricing tactics of a few remaining transcontinental railways.

It is thus apparent that the CITL, by presenting itself to the government as a group more interested in theoretical speculation rather than policy suasion, constituted a less potent lobbying force than other pressure groups whose objectives may have been to "sell" a particular regulatory agenda.

During the 1983 CTC interview, the CITL made a policy statement which could have proven to be their "achilles heel" in later public submissions, had the Canadian railways adopted a counter-strategy of exposing the inconsistency of this shipper group's formulations.

The CITL executive admitted that two-thirds of their members were in favour of retaining the collective rate-making provisions for Canadian railways within the existing transport law.⁵¹ The association further submitted that the majority of CITL members were not in favour of confidential contracts

being permitted in Canada.

Ironically, the CITL was soon to become a leading proponent among Canadian shippers' associations in favour of immediate abolition of collective rate-making in Canada and implementation of legislative provisions which would give shippers and railways the option to enter into confidential contracts.

It is thus pertinent to examine not only why this pressure group would have wanted to so reverse its policy objectives in such a short time-frame, but also how they went about publicizing such a major strategic turnaround while simultaneously limiting predictable damage to their credibility.

Of the possible reasons why the CITL decided to radically alter its strategy, the increasing realization of its status as a weak lobbying force and its likely displacement as the leading policy-oriented representative body for Canadian shippers, should be considered.

Added to these perceptions, were the alarming revenue prospects derived from a dwindling membership base and a sense that the CITL may have become complacent after the twenty years of unchanged regulatory policy to which Canadian shippers had been subject. The initial cautiousness which the CITL demonstrated in its attitude with regard to those changes which had occurred to the U.S. national transportation policy was perhaps out of line with the views of many of its members, such as certain individual shipper submissions described in Chapter 9, to the effect that these U.S. developments had led to positive results which should be emulated in Canada.

The methodology employed to reverse its policy orientation with a minimal loss to credibility is less speculative in nature than the above analysis regarding probable cause.

In 1984, the CITL hired a new president who had been the former assistant deputy minister of the Ontario Ministry of Transportation and Communications. The association then decided to survey its membership by a written questionnaire on their views with regard to the desirability of future legislative change. This consultative process was highly non-traditional due to the already described feature of the generally unrepresentative nature of Canadian shipper pressure groups policy positions (see subsection (b) of this Chapter). Evidence that members were unaccustomed to having their views solicited by the association may be found in the fact that only twenty-five (25) companies responded to this critically important CITL questionnaire. This represented a response ratio of less than 1/20th of total membership. Furthermore, of the twenty-five (25) companies responding, seventeen (17) of them had rail freight charges in 1982 of more than \$10 million Can. each. More than a quarter of the respondents distributed over one

million tonnes of rail freight per year. Therefore the few CITL members which did respond to the survey could not have been considered representative of the vast majority of Canadian shippers due to their exceptionally large individual demand for rail services.

Nonetheless, recognizing that the survey's response was weighted heavily in favour of large companies, the answers proved quite instructive. For example, sixty-four (64) percent of the respondents stated that imports had demonstrated adverse effects upon the products of Canadian manufacturers (see variant of Hypothesis I). Eighty-eight (88) percent attested to having obtained benefits by moving freight off Canadian lines and onto the U.S. rail lines at the closest border points (shorthauling). Sixty-seven (67) percent had parent or subsidiary companies in the U.S. and of these, twenty-five (25) percent stated that international confidential contract rates would put their company at a competitive disadvantage to their own U.S. affiliate.⁵²

The 1984 CITL survey showed that eighty (80) percent of the respondents wanted Canadian regulations changed to adapt to the U.S. status quo. Furthermore, CITL members answered in the majority that Canadian regulations should be modified to permit Canadian railways the option of entering into confidential contracts on international movements, as well as the ability to have rebates included in those contracts. Finally, the CITL survey results indicated that the Canadian railways should not be allowed to price collectively on international traffic.

Many public policy strategists would have chosen not to release survey results which manifested such a low response ratio, in addition to being in direct contradiction to the association's recent previous regulatory recommendations. However, the new president of the CITL decided to risk the survey's being exposed to substantial criticism, in order to embark upon a new strategic direction and a new image for this pressure group as expeditiously as possible.⁵³

This decision appears in retrospect to have been well founded, as the 1984 CTC submission by the CITL⁵⁴ in which they attempted to support their new strategic position with the above-mentioned survey results, marked the beginning of their establishing a much wider power base among Canadian shippers. Consistent with their strategy of not rebutting opposing presentations [see Chapter 12(i)(e)], the Canadian railways never focused their attention upon alerting the government to the above-mentioned CITL policy inconsistencies.

With new management and the reversal of their traditional strategy which had favoured the preservation of the status quo, the CITL began systematically opposing the policy recommendations of

the Canadian railways.⁵⁵ This strategy, over time, contributed to a gradual polarization on policy issues which developed between many shippers and the railways in Canada and led to the demise of the Canadian railway executives acting as uncontested spokesmen for the entire transport industry (see Chapter 8(a) and 12 (i)(e)).

The theory that a well-known central Canadian and manufacturing-based pressure group, such as the CITL, by reversing its strategy from "carrier-friendly" to "carrier-adverse", contributed significantly to the erosion of the previously dominant position held by Canadian railways in determining the transport regulatory agenda in Canada is impossible to prove empirically due to its speculative nature. For example, the components of the above theoretical equation could be challenged in the following manner:

TABLE XXIX

**EXAMPLES OF POSSIBLE THEORIES OPPOSING PREMISE THAT CITL
STRATEGY REVERSAL CONTRIBUTED SIGNIFICANTLY TO POLARIZATION
BETWEEN CANADIAN SHIPPERS AND RAILWAYS**

**POLARIZATION BETWEEN
SHIPPERS AND RAILWAYS
NEVER OCCURRED**

Government had always consulted both shipper and railway constituencies - for example, several Transport Canada, and CTC discussion papers had been produced in previous years, in which shippers were regularly consulted.

OR

It would have been politically counter-productive for the Canadian government to have previously allowed railways to dictate policy and thereby disenfranchise shipper votes - for example, the pro-shipper measures in the 1967 transport legislation, such as basic public interest appeal provisions, which were expressly not in favor of the railways.

**POLARIZATION BETWEEN
SHIPPERS AND RAILWAYS DID
OCCUR**

However, CITL was not a significant contributor to this development, nor was it the leader of Canadian pressure groups.

OR

The change from Liberal to Progressive Conservative government in 1984 sent signals to shippers that their policy views would be taken seriously. This was the "causa causans" of the polarization, rather than change in CITL strategic direction.

OR

The polarization was rather caused by the rebate opportunities manifested by Staggers.

OR

The polarization was derived from the strategy formulation of western-based bulk commodities shipper groups, such as COFI, whose shippers, being captive to one railway, were the primary beneficiaries of the National Transport Act, 1987, provisions.

Thus, regarding the theorem of CITL contribution to transport environment polarization, there appear to be certain provable and other unprovable components. The fact that in 1983 the CITL favoured collective ratemaking and opposed confidential contracts, while in 1984, this position had been reversed is incontrovertible. Similarly, the CITL's appointment of a new president, their revival of membership in 1984 and the lack of customary opposition by shipper pressure groups, prior to 1984, to the influence which the Canadian railways customarily exerted in government relations are all elements which cannot reasonably be contested.

By contrast, whether the reversal of CITL strategy in 1984 led to this pressure group's being perceived by Transport Canada officials or by shippers generally as a more prominent lobbying force constitutes an empirically unprovable conclusion due to its judgemental nature, as well as the difficulty in scientifically defining the structure of the government group being lobbied. For example, how could one adequately define the categories of "shipper leadership" or "decision-making government officials" in order to conduct a meaningful research survey, due to the differentiated weighting to be accorded to members within the same group. Thus, the deputy minister's opinion of a given pressure group would be more likely to affect government initiatives than that of a less senior bureaucrat. Moreover, assuming that one were to acceptably circumscribe the subject grouping, such as senior governmental officials, so to ask whether they found the CITL to have assumed the role of pressure group leader in 1984 or to have contributed significantly to policy polarization, this would perhaps unfairly superimpose the questioners' concepts upon those questioned.

Having recognized this qualification to empirical measurement, it is nonetheless instructive to analyze the dynamics of the CITL transformation. With the change of both management and strategy which occurred in 1984, the association can be said to have modified its image, but not the views of its membership, which remained reticent over the prospect of heightened competition within their own respective markets. For example, in their 1983 CTC interview, the CITL executive expressed concern that the Canadian railways, in order to preserve their long haul routings, may have been already giving quasi-confidential concessions to certain shippers, the discounted rates of which other shippers were unaware. Of the possible mechanisms which Canadian railways had occasionally employed to give an advantage to a preferred customer, secret loading allowances, side rate agreements, divisional arrangements with connecting U.S. carriers, payment of the construction of a rail siding or nominal rents for usage of a railway-owned facility constitute some examples.⁵⁶ The CITL's concern over such rate differentiation

was a reflection of the membership's likely opposition to the lifting of protective regulatory barriers such as had been achieved under Staggers, which would have eliminated the uniform transport charges which all shippers of a given commodity incurred.

Another example of this association's unwillingness to forego Canadian legislative provisions which guaranteed a degree of rate and service equalization, irrespective of mileage or shipper size, was the above-cited CITL survey response to the effect that 64% stated that imports had an adverse effect upon Canadian manufacturers. It may therefore be concluded that the CITL membership were wary of being required to compete in a North American marketplace. Nonetheless, they were perhaps intrigued by the prospect of Canadian railways competing against one another and thereby reducing rates. Given this unequal predisposition toward competition, it is indeed remarkable that the new president of the CITL could have achieved such an image transformation, whereby the association, within the year of his appointment, would be making public submissions opposing collective ratemaking and favouring confidential contracts. This development may well contribute to the negation of the postulate expressed earlier in that one or two individuals, be they executive or staff, may have had the ability to set the strategy for an entire pressure group representing hundreds of corporate members.

g) CANADIAN PULP AND PAPER ASSOCIATION

Another pressure group which reversed its strategy between 1983 and 1984 without any apparent damage having been done to the credibility of its later public submissions, was the Canadian Pulp and Paper Association (herein referred as CP & PA).

As has been described in some of the specific examples in Chapter 3 (b) and (d), long-haul transborder diversion which occurred soon after the enactment of Staggers, woodpulp originating in Canada's western provinces of British Columbia and Alberta, as well as newsprint paper from the eastern provinces of Ontario, Quebec and New Brunswick, were among the first "casualty" commodity groups to be shorthauled in Canada and rerouted through the U.S. to newspaper mill destinations in the North-eastern states.

The CP & PA represented sixty-five member corporations which claimed to cumulatively produce 98% of Canada's pulp, paper and paperboard. So as to indicate the importance of this industrial grouping to the Canadian public interest, in 1983 CP & PA members provided employment for over 80,000, shipped approximately 200,000 rail carloads and produced 20.2 million tons of freight which was

transported by all modes, of which 80% were to export markets. In 1982, the Canadian pulp and paper industry accounted for exports substantially exceeding imports, with a net balance of \$7.7 Can. billion.⁵⁷

The CP & PA initially took the opposite stance to that of the Council of Forest Industries by affirming that the historical joint through rate structure continued to exist as the basis for all rail pricing on Canada/U.S. movements.⁵⁸ As has been described in Part I, the Canadian and U.S. railways had over many decades prior to U.S. deregulation, devised a system whereby the transborder rates would be uniform from one region to another, irrespective of the differentiation in mileage or of the participating rail carriers.⁵⁹ For example, all woodpulp rates from the Province of Alberta to the Northeastern states would have been identical, even if one shipper served by both CP Rail and the connecting Soo Line was located in Calgary, Alberta and was situated 500 miles closer to destination than another, located at Red Deer, Alberta served instead by both the CN and BN.

The CP & PA's strategy of stating that the joint international through rate structure was still intact, despite evidence of price differentiation caused by U.S. confidential contracts, was complemented by the association's unique position to the effect that the U.S. railway rebating practises were "a short-term manifestation".⁶⁰ The association argued that contract discounts were being offered primarily by financially unstable "bridge" rail carriers endeavouring to increase their market share. Considered from a 1990 perspective, and acknowledging the tens of thousands of rebates which have and continue to be signed by major U.S. railways such as BN, CSX and Conrail, the CP & PA's 1983 assessment of confidential rebating appears to have been wholly inaccurate. Nonetheless, it was consistent with the association's policy priorities of maintaining rate parity as between rail rates offered to Canadian and U.S. shippers in competitively related regions and of preventing competition among CP & PA Traffic Committee members.

It has previously been noted that it was frequently less important for Canadian companies to obtain a lower rate per se than to be assured that their competitors were not obtaining a better level of transportation charge. This attitude of putting greater weight on industry rate equalization, rather than on individual diminution of corporate transportation costs in relation to the company's other costs, such as labour, materials and fuel is pertinent to understanding the phenomenon, irrational in an economic sense, of how Canadian pulp and paper firms may have exhibited competitive characteristics with regard to end-product, but not on certain cost components, such as transport charges.⁶¹

Therefore, in 1983, the CP & PA was entrenched in preserving the Canadian regulatory status quo. Their strategy was to favour the obligatory publication of all freight rates, the protection of shippers

against predatory pricing by railways through maintaining the existing legislation's public interest appeal provisions and this association further recommended the creation of an international commission which would monitor and regulate joint through rates between Canada and the United States.

At the October, 1984 CTC public hearings, the association executed a complete about-face with regard to their policy position of a year previous. The CP & PA submitted that their membership were now opposed to the continuation of collective ratemaking and proposed that the Canadian railways be permitted to enter into confidential contracts with Canadian shippers on international traffic.

The association's revised strategy contradicted their previous recommendations in a number of ways. In addition to the obvious conflict between the previous year's proposal to continue obligatory rate publication and the later recommendation to allow confidential contracts, the CP & PA also compromised its former position favouring historical joint through rate relationships and public interest appeals. For example, confidential contracting would invariably cause the erosion of rail pricing uniformity which was the cornerstone of regional rate equalization and joint through rate relationships. Assuming, as has been noted above, that the CP Rail-Soo Line rates given to a woodpulp shipper located in Calgary, Alberta had always been identical to those offered by CN-BN to a competing shipper in Red Deer, Alberta, due to regional pricing equalization, the proposed ability of CP Rail and Canadian National to make confidential contracts, added to the elimination of collective ratemaking recommended by the CP & PA, would inevitably cause a divergence in the rates paid by the two above-mentioned shippers.⁶² Moreover, the option to lawfully extend secret rebates by a Canadian railway to its preferred customers would likely cause a further erosion of historically equalized rate structures. Lastly, the existing public interest appeal (Section 23, National Transportation Act, 1967) which the CP & PA had proposed retaining in 1983, had traditionally been characterized by cases based upon regional rate relationships, which were being jeopardized by the association's 1984 recommendations.

Consistent with their strategy of not responding to the reversals in policy recommendations of the CITL, the Canadian railway lobbyists did not alert the government nor the public to the above-described CP & PA policy inconsistencies during the debate which ensued regarding the future regulatory system to govern Canadian transportation. This surprising neglect to respond directly to the policy formulations of those pressure groups opposing the railways' recommendations may be accounted by the customary surfeit of confidence which the Canadian railway management exhibited in believing that the government would ultimately follow their legislative suggestions, as they had done in the past. The

Canadian railway strategists may not have been sufficiently sensitive to the impact which such a polarization of opinion could have on their traditional role of acting as the principal spokesmen for the entire industry. Nor perhaps were they adequately aware, as they should have been, of the degree of pro-shipper sentiment which existed within the policy formulation group of senior bureaucrats appointed by the new Conservative Transport Minister, to supervise the creation of draft legislation and facilitate its progress through the House of Commons.⁶³

Whereas the Canadian railways may have been committing an error in strategy by not responding specifically to the arguments of their opponents, the CP & PA did not adopt the same tactic of distancing itself from railway submissions. For example, CP Rail had submitted a series of policy recommendations in 1983, some of which proposed that Canadian railways be given the legislative authority to cancel routings and to limit their statutory freight damage liability, in order to include within the Canadian regulatory environment those same freedoms given to U.S. railways under Staggers (see Chapter 11(c)).

The CP & PA argued that there was no need for the Canadian railways to apply for such legislative modifications, since the existing law did not prohibit these practices. This position constituted an original and deft counter-strategy for two reasons. Firstly, it was accurate to infer that these two railway policy objectives, by not being explicitly prohibited by statute, were already permitted within the framework of the then current legislation. There were no provisions in the Railway Act of Canada which disallowed route closures or joint rate cancellations, although there did exist the possibility that aggrieved shippers would initiate a public interest appeal to have the Canadian Transport Commission countermand such decisions, if the criteria of public interest, as envisaged by Section 23 of the National Transportation Act, 1967, could be proven. Similarly, the existing Canadian legislation allowed the railways to limit their liability below statutory levels if the shippers affected would agree and the CTC would then approve the latter's modified bill of lading.⁶⁴

Secondly, by logical extension, government analysts in reviewing the other CP Rail policy recommendations would likely examine whether these required specific legislative redress or whether they too were already permitted within the existing regulatory framework. For example, it has been previously noted that both Canadian railways had requested immunity from the extra-territorial reach of the U.S. antitrust laws as part of their lobbying agenda. However, unless Canada's Parliament would have been called upon to enact retaliatory legislation (a solution which, although there existed both British and West German statutory precedents, had never been envisaged by the railways), was it not an inappropriate venue

to request the Canadian government to grant such immunity? Similarly, it has been described above (see Chapter 5(c)) how the Canadian railways were already adjusting divisional arrangements with U.S. connectors in order to extend confidential rebates to certain Canadian shippers under the tolerant supervision of the CTC. Given this de facto accommodation to the confidential contracting practises by U.S. railways permitted under Staggers, was it strictly necessary to approach the Minister of Transport, as CP Rail did in 1983 in order to propose that the existing transportation regulation undergo such substantive alterations?

Although many of the CP Rail regulatory recommendations were desirable for the company to add to its policy plan, they may not have been essential to the company's continued viability. By not restricting its legislative recommendations, CP Rail requested the Canadian government to totally rethink its transport policy, and the railway strategists learned to their regret, as will be examined in Part III, that they could not contain the legislative reforms to their own original proposals. The solution which the Canadian government was ultimately to adopt in 1987 would include shipper-oriented provisions such as final offer arbitration, competitive joint line rates, and equity appeal provisions, all of which had never been contemplated by the railways and if they had, would have made the initial and expanded suggestions by CP Rail and CN to revise the legislation appear as a strategy fraught with risk.

A final component of the CP & PA submission to the CTC public inquiry in 1984 was their recommendation that the revised Canadian legislation not permit the railways to surcharge joint international through rates, one of the other transport policy recommendations of CN and CP Rail in 1983. This position may well have derived from the dissatisfaction which certain association members had demonstrated when the Canadian railways unilaterally imposed a fuel surcharge upon all shippers' rates in 1982 due to the unforeseen consequences of the OPEC embargo.

What had caused the CP & PA to protest so vociferously in 1982 was not that the railways would increase their rates to reflect rising fuel costs, since CP Rail and CN had already considered the oil supply shortage in their annual rate increase to association members a few months earlier, but rather that due to their own miscalculations as to the severity of the impact, the railways had unilaterally increased the rates again under the guise of a "surcharge". When the Transport Minister was obliged to intervene due to the CP & PA's continued remonstrations, the Canadian railways promised not to impose similar surcharges in the future. ⁶⁵ This incident is noteworthy for the purposes of policy analysis for the following three reasons:

Firstly, it demonstrates how the Canadian freight rate negotiating structure appears to have previously favoured the railways over shippers, given that the former could so readily impose unilateral price increases at will. Secondly, it characterizes the prevailing attitude of many Canadian shippers toward passivity rather than litigation, when faced with what they believed to be inequitable carrier practises, in that the CP & PA members protested to the Transport Minister, requesting a political remedy, rather than initiating a public interest appeal before the Canadian Transport Commission. Thirdly, the association's lobbyists seem to have overlooked the inconsistency between the Canadian railways' 1982 commitment to the Transport Minister not to engage in future unilateral surcharges and their 1983 policy recommendations to be permitted to do just the opposite.

h) CANADIAN CHEMICAL PRODUCERS ASSOCIATION

In contrast to the strategy selected by the CP & PA, the Canadian Chemical Producers Association (herein referred as CCPA) were less concerned about preserving the joint international through rate system, than with reducing the actual rate levels which would be offered to their industry and increasing the competitive responsiveness of Canadian railways under a revised regulatory schema. The Chemical Producers were similar to the CP & PA in association structure, membership and mandate, with the important distinction that they represented manufacturers of a different commodity group. Moreover, both of these pressure groups had internally diverse perspectives deriving from their respective Western and Eastern Canadian members. However, the reasons for such divergence were quite distinct. The Western members of the CP & PA were more dependent upon competitive rail transportation rate levels given the comparatively greater distance between their origin locations (such as B.C. and Alberta) and those of Eastern Canadian members who were so much closer and oftentimes had the additional option of trucking their products to common Northeastern U.S. paper mill markets.

By contrast, the Western Chemical Producer members in many instances did not compete directly with Eastern members, as the former tended to ship their products to Pacific Rim countries. For example, in an internal survey of the Chemical Producers' membership in 1984, it was revealed that 21 companies out of 43 respondents had not shipped any chemical products by rail into the U.S. during the previous year.⁶⁶ These Western members would typically have been more concerned with policy issues relating to the possible diminution of their international market share due to Canadian railway export rates being higher than U.S. railway contract export rates under Staggers (for example, the relationship between

movements through the ports of Vancouver or Seattle to Japan).

Despite this lack of homogeneity within the membership of the Chemical Producers, ⁶⁷ the association was able to achieve an apparent consensus on the following strategic direction.

The Chemical Producers, through their executive, expressed the view that the rate and service benefits which U.S. shippers were experiencing since the enactment of Staggers, were not due to the lessening of government intervention per se, but rather to the encouragement of intramodal U.S. railway competition caused by the elimination of anti-trust immunity.

In recommending that the practise of collective ratemaking be similarly prohibited in Canada, the association adopted a reasoned and less antagonistic lobbying approach than other pressure groups herein examined. For example, they acknowledged that there already existed a certain degree of "important service competition" between the Canadian railways. Nonetheless, the Chemical Producers predicted that enforced individual carrier decisions would likely result in greater pricing innovation and a differentiation of rail transportation service "products".

The association stated that they were supportive of railway financial viability; on the other hand, they perceived regulatory policies which restricted competition in order to protect railway profit margins to be of greater disbenefit to the public interest. The CCPA assessed the counter-argument by the railways' lobbyists that rate wars and destructive competition would likely result from such pro-competitive legislation, to be improbable due to the carriers' greater knowledge of their own costs since the Second World War. Moreover, the association presented specific examples of the inefficiencies of rate negotiations within an environment which was permissive of collective pricing strategies, such as one Canadian railway refusing to agree to a certain single factor rate because it was allegedly unable to obtain concurrence from the other "competing" Canadian railway. They cited the common shipper experience of once having insisted on negotiating with the two Canadian railways separately, a producer would discover at the meeting with the second railway that the information he had presented at the first "confidential" meeting to be already known by the second carrier.

Although the Chemical Producers, by analyzing the arguments of the railways in a considered manner and by professing a certain support for the railways' objectives, selected a more persuasive (Win-Win) lobbying strategy than certain pressure groups previously discussed, the weakness of their reasoning appears to lie in the somewhat naive assumption that the Canadian railways would immediately engage in price competition solely due to their collective ratemaking practises being prohibited.

Effective regulation may be said to actively guide and encourage a target subject group toward a course of anticipated behaviour. The mere termination of an existing collusive practise after an uninterrupted duration of several decades cannot reasonably be presumed to cause the commencement of an opposing pro-competitive practise, especially when the target group (with their attitudes favouring the old practise largely intact), and their customers (who had tolerated the previous practise for so many years) remain the same.

There may also have been inadequate attention given to the infrastructural differences between the pre-Staggers multi-competitor U.S. railway industry and the Canadian railway duopoly wherein one competitor was government-owned.

Consistent with their view that Canadian transport policy should be modified so as to encourage greater intermodal and intramodal competition, the Chemical Producers recommended that confidential freight contracts be permitted legislatively. Of the advantages which they predicted, two were particularly noteworthy. Firstly, the CCPA projected that the carriers would be more likely to make concessions to large-volume customers, if smaller shippers could not request similar concessions due to rate transparency (see discussion of Hypothesis III). This first argument may have been of questionable strategic value as politically-sensitive policy makers might normally be expected to favour legislation which would give smaller shippers equal opportunities, given the tradition of regionally uniform rate structures and price parity which have permeated Canadian rail regulatory history.

Secondly, the Chemical Producers perceived an advantage from confidential contracting in that the same product might have a number of different applications. For example, ammonia is used both for fertilizer as well as in the manufacture of explosives. As end-market competition constitutes a recognized factor in rate setting according to value-of-service pricing theory, the association predicted that lower rates for only one application might be established if they were not perceived as constituting a published precedent for the other application. This argument, however, was based upon the errant assumption that the regulatory agency would not review contracts in the public interest if they were suspected by other shippers of being discriminatory. However, this type of contract review process had already been incorporated in the Staggers Act regulations and, as will be examined in Part III, would also be included in the future Canadian legislation⁶⁸ under the category of public interest equity appeals.

As with the CITL and the CP & PA, the Chemical Producers underwent a significant transition from their first policy presentation to the Canadian Transport Commission in 1983, wherein they hedged

their recommendations in favour of confidential contracts by advocating the concurrent publication of certain freight rates, in order to establish an upper limit for the pricing of commodity movements.⁶⁹ By 1984, the association had solidified its pro-competitive stance among its own membership, as the influence of other pressure groups, the change in avowed policy direction by the new Transport Minister following that year's Conservative federal election victory and the continuing transborder diversion effect of Staggers, resulted in a greater propensity toward risk-taking within their traffic subcommittee. For example, in their 1984 public submission to the CTC, the Chemical Producers argued that they were not opposed to the Canadian railways' recommendation that the public interest appeal recourse (Section 23, National Transportation Act, 1967) which constituted the only protective regulatory mechanism then available to shippers, be eliminated at the same time as the abrogation of the legislative provision permitting collective ratemaking (Section 279, Railway Act). This rather daring strategy, which was fully consistent with the theory that economic regulation is unnecessary in a competitive environment, was not given substantial consideration by the public servants drafting the new legislation, since this recommendation was not corroborated by any other shipper pressure group.

There are two final issues relating to the strategy selected by the Chemical Producers which warrant further discussion. Firstly, in a survey of its membership, the results of which were released to the public in 1984,⁷⁰ it was revealed that as much as one-third of the transborder rail traffic being transported by twenty of its member companies had been governed by confidential contracts. This direct admission that so many of the association's members were contravening the tariff publication and anti-rebate provisions of the existing Canadian law would, in other jurisdictions, have been expected to result in prosecution and public incrimination against the companies involved. Instead, no one among the regulatory agency, Canadian railways or journalists, even questioned the illegalities committed. This confirms two theories already stipulated above, firstly that the Canadian Transport Commission did not act as a deterrent force (see Chapter 9(g)), but rather in a monitoring capacity only and secondly, that because of this lack of enforcement, remedial legislation may not have been necessary and should not have been initiated by the railways, which stood much more to lose in the unpredictable process of policy re-evaluation.

Lastly, the Chemical Producers acknowledged that removing the legislative requirement to publish all rates would likely result in an increase in the transaction costs of shippers, who would instead have to resort to greater intelligence gathering in the marketplace in order to assess the freight rates

negotiated by their competitors.⁷¹ However, the association submitted that price leadership on the part of the two Canadian railways would become a means of offsetting these increasing transaction costs.

It is understandable how price leadership or conscious parallelism by the Canadian railways may have contributed to a greater uniformity in pricing structures, thus making it easier for shippers to know the matched prices of the two railways and lessening transaction costs. However, it is difficult to appreciate how such a development could have been regarded as being in the shippers' best interests, given its negative influence on competition. The support given by the Chemical Producers to the prospect of such price leadership appears to have been entirely inconsistent with the association's otherwise pro-competitive orientation and may have constituted an inadvertent reversion to the membership's former acceptance of rate equalization and knowledge of each other's rate levels.

i) CANADIAN MANUFACTURERS ASSOCIATION

The last major shippers' association to be herein examined is the Canadian Manufacturers' Association (herein referred as CMA), which is one of the largest pressure groups in Canada, its membership being based in the more industrialized and populous regions of Southern Ontario and Quebec. The low priority given to transportation within this organization was evidenced by the fact that of its full time staff of more than one hundred persons, only one employee's duties were devoted to transportation.⁷²

Whereas the CMA pursued a pro-competitive orientation in their strategic selection, it is noteworthy that their traditional "carrier-friendly" disposition appears to have caused a serious dilution in their policy recommendations.

For example, in the 1983 interview with CTC investigators Harris and Graham, one CMA member who requested that his company's name not be identified even in the Commission's own internal files, noted that their business had benefitted substantially from CN and CP Rail having prescribed themselves from not discussing southbound rates to the U.S. due to the extra-territorial reach of the anti-trust laws.⁷³ Similarly, in a 1984 presentation, the association concluded:

Our biggest market and toughest competitor has the advantages of a less regulated railway system... the cost of not making the necessary adjustments can be measured in a loss of export sales, increased cost of imports and a greater penetration of Canadian markets by American goods. North America has become a single market for goods and services

including transportation services. Therefore, our only course is to adapt to American railroad deregulation. ⁷⁴

However, despite the above argumentation in favour of U.S. transport policy harmonization, the CMA restricted its recommendations to requesting that confidential contracts be permitted solely for international traffic, rather than for domestic movements as well. What may have prompted this association to so limit its policy proposals was their intention to appear conciliatory toward very similar 1983 recommendations regarding confidential contracting formulated by the Canadian railways.

In addition to the previously discussed difficulties which such a regulatory dichotomy would inevitably engender such as the perceived discrimination against domestic shippers, as well as the direct competition for end markets between domestic Canadian shippers and U.S. shippers operating under a less regulated environment, ⁷⁵ there remains one further fundamental flaw - the lack of a theoretical basis for such a dual system of regulation. In economic theory, regulation is deemed necessary in order to protect certain groups of individuals against the potentially exploitative actions of suppliers who are not themselves adequately subject to the forces of competition. ⁷⁶

For example, during the previous century, the railways were regulated in both the U.K. and the U.S. due to their governments' policy of protecting passengers and shippers respectively who had few, if any, competitive alternatives to rail service, from the oligopolistic power of the carriers. ⁷⁷ Thus, regulation was deemed necessary due to the lack of competition.

By contrast, a deregulatory transportation-related application would be the exemption from economic regulation of boxcar traffic by the Interstate Commerce Commission in 1984 (see Chapter 4(e)), based upon the government agency's decision that there existed sufficient competition to the railways by the truck mode available in the U.S. for those commodities which were transported in this type of rail equipment, such as pulp and paper products. ⁷⁸

Within this conceptual context, there would have been insufficient theoretical justification for the CMA's proposed regulatory dichotomy with regard to confidential contracting being restricted only to international traffic.

Let us take the example of a Canadian lumber shipper, Welco Lumber Company headquartered in Vancouver, B.C., which sells kiln-dried and dressed spruce, pine and fir originating in British Columbia both to Canadian markets, such as in Southern Ontario, as well as to U.S. destinations such as in Massachusetts. ⁷⁹ Assuming that the CMA's above policy recommendation would be implemented, this

company could enter into a confidential contract with CN or CP Rail for its U.S.-destined shipments, but not for its domestic destinations. Yet in both cases, this shipper is negotiating with the same Canadian railway(s) for the major portion of a transcontinental haul.

Quare - If economic regulation is necessary only in the absence of competition, why should the Canadian movements of Welco be regulated and their U.S.-destined movements deregulated? The answer is not, as the CMA or Canadian railways might suggest, that the U.S. destination markets are differentially characterized by additional competition from deregulated U.S. railways, since the Canadian markets in Ontario could equally be supplied by U.S. carriers shorthauling CP Rail or CN over Western border gateways⁸⁰ or by U.S. railways providing identical lumber products directly from the Pacific Northwestern States of Washington and Oregon (see variant of Hypothesis I). It is precisely because of the "North American economy" which the CMA was earlier quoted as having acknowledged, that it would have been incumbent upon this association to have established a sound economically-based theoretical substantiation for its recommendation in favour of such a regulatory dichotomy.⁸¹

One final note regarding the CMA's public representations pertained to the effect that a CTC request for information relating to the confidential rebates which some of their association members had, since 1980, received from U.S. railways. The CMA responded that this request could not be met, as it would cause those companies to be in violation of U.S. transportation legislation. This refusal to comply with a Canadian government agency mandate to gather such information was not only based upon the false premise that it would somehow have been in contravention of Staggers Act provisions, but the CMA appears to have been unaware or unconcerned that such rebates were illegal in Canada and would have rendered certain members liable for the statutory penalties prescribed by Section 286, 287, 381 respectively of the Railway Act of Canada.

It seems puzzling that the Canadian companies, while actually contravening various provisions of their own country's transport law by accepting unpublished rebates, would rather be concerned about the possible legal ramifications of another national jurisdiction. An explanation for such behaviour can perhaps be found in the very different degrees of enforcement which had traditionally been exercised by the regulatory agencies of Canada and of the U.S. Given that the Canadian Transport Commission had rarely if ever filled a policing role or exercised any punitive measures within its authority, it is understandable that the CMA was seemingly unconcerned about possible contraventions to Canadian transport regulations [see similar evidence in Chapters 9(g) and 10(g)].

One may conclude that an activated enforcement function by the regulatory agency is as instrumental to effective policy formulation as the substance and direction of the regulations themselves.

Conclusions

As with the "individual shipper" category which has previously been analyzed in Chapter 8, there existed several other Canadian shippers associations,⁸² whose depositions and strategies were characterized by diverse concerns and recommendations. The permutations and combinations of the above transport policy positions by these other shippers associations' did not establish any greater propensity toward consensus in formulating an appropriate legislative solution to the problem of transborder diversion as has been described in Part I.

The selection of the seven shippers' associations for the purposes of this analysis was based upon two criteria: a) prominence within the context of the Canadian railway industry and, b) full participation in the CTC public inquiry process as demonstrated by in-depth submissions.

From the foregoing analysis, one becomes aware of the evolutionary process in which several of the shippers' associations developed and modified their policy recommendations during the period of legislative review. The remarkable reversal of strategy between 1983-1984 regarding the acceptability of confidential contracts which was exhibited in the cases of CITL, CP & PA, COFI, and CCPA attests to the dynamic condition of strategy selection. Before stating the hypothesis which was tested upon the selection of strategy by this pressure grouping, two preliminary assumptions were made, one pertaining to the representativity of shippers' associations, and the other relating to the likely similarity of positions between this constituency and those of individual shippers. The first assumption, that the associations were representative of the views of their respective membership, as was the decision-making process employed for strategy selection, does not appear to have been confirmed by the evidence at hand in three fundamental ways. Firstly, it would not have been feasible for the associations to have solicited the transport policy views of their full membership. For example, the Board of Trade comprised 15,000 corporate members and thus required an "arms length" structure as between the membership and its various committees. Secondly, the industry associations were often treated by Transport Canada as "vehicles of convenience" and thus were not examined by the policy decision makers as to their representativity for the purposes of lobbying. Thirdly, the decision-making function within a small working transportation committee within an association could well have been carried out without formal ratifica-

tion by the general membership.

The second assumption was that the policy recommendations of the shippers' associations would be similar to the public submissions of the individual shipper category and any differences could predictably be attributed to the more formal structure or divergent goals of the associations.

There appears to be a substantial correlation with regard to the range and structure of policy recommendations between the two categories of pressure groups. For example, the APTC took the position that the existing regulatory framework which governed the Canadian rail transportation industry should remain the preferred legislative standard as compared with U.S. deregulation, in all but exceptional situations. This strategic determination was equally demonstrated in the submissions of Col-Pac, Indusmin and Canterra Energy. Moreover, the Win-Win strategy devised by the Chemical Producers was both structurally and directionally similar to the deregulatory recommendations proposed by PCS and Alcan.

The second facet of the above assumption was however not corroborated by the data herein examined, in that the more formal structure or divergent goals as between associations and individual shippers (for example, lobbying objectives as compared with commercial objectives) did not contribute to the former category exhibiting fewer extraneous comments (for example, the extra-judicial admissions pertaining to rebates by the Chemical Producers compared to those by PCS, or the unnecessary commentary referring to U.S. motor carrier deregulation by COFI as compared to that of Union Carbide) nor greater logical consistency. This surprising absence of greater comparative professionalism on the part of shippers' associations may be attributed to the tendency by this category of pressure group to formulate policy by committee rather than by full-time staff. Once these two assumptions have been assessed, it was then possible to examine the principle hypothesis relating to this classification of pressure group:

Hypothesis IV -That shippers' associations would work together in order to present the government with a common set of policy plans, so as to achieve a cohesive lobbying approach, rather than permit regional base differences or inter-group competition to lead to significant strategy disparity.

It was not apparent from the positions of associations herein examined that any of them demonstrated a concern for their respective policy recommendations to comprise a co-ordinated strategic plan.

The difficulties which certain associations would have had to surmount in order to reach a consensus among the divergent interests of their own members (for example, Halifax vs. Saint John

positions within APTC, or BCOL vs. CN/CP locational differences within COFI) appears to have taken their primary focus instead. As a result of this lack of co-ordination, the CMA's recommendation that confidential contracts be subject to a domestic/international dichotomy, was distinct from the APTC's recommendation to the effect that such contracts be permitted for southbound U.S. movements only. These two strategies were opposed and possibly neutralized by other associations, such as COFI and the CP & PA which were in favour of confidential contracts for both domestic and international traffic.

Despite the independent and non-coordinated approach to strategy selection exhibited by this pressure group constituency, there was a certain commonality manifested in the respective policy formulation of these associations. In examining the data contained in this chapter, it was discovered that the general membership of many Canadian shippers' associations were still in favour of a protected schema of maintaining rate transparency, equalized joint international through rates and of ensuring that their particular rate levels were not less advantageous than others within the region. Consider that in 1983 all of the seven associations examined had made public statements in favour of retaining both tariff filing and collective ratemaking. By 1984, four of these major lobbying entities had completely reversed their strategy, even though it would be unreasonable to assume that so many individual shipper members could have simultaneously changed their views. In the case of the CITL, this strategy reversal was orchestrated without any real evidence of a concurrent modification in membership position, given the 1/20th response ratio which their survey produced.

Not only did it appear that the executives of these four associations were attempting to re-direct the policy positions of their associations independently of their respective general membership, but the fact that these four associations all suddenly reversed their regulatory strategies suggests a common external cause. For example, the Minister of Transport may have sent a clear message that more competition within the Canadian rail transportation industry was desirable and would likely be incorporated in the remedial legislation.

It may not have been internal leadership from within the pressure group nor a collective intention to co-ordinate policy planning, but rather external leadership from a common source which prompted several major Canadian shippers' associations to simultaneously reverse their previous policy positions. Therefore the above hypothesis has not been demonstrated to be valid in the sense that any similarities in policy formulation were not deemed to have resulted from the implementation of an objective by shippers' associations either to present the government with a common set of policy plans or to intentionally avoid

the creation of strategic disparity.

A variant of Hypothesis IV, that the shippers' association(s) which took the greatest degree of leadership in the policy debate would be the most effective in the context of the ultimate legislative outcome, cannot be confirmed from the evidence herein presented for two principle reasons. Firstly, the patterns of strategic formulation did not reveal any inter-association communication or attempts at mutual influence, and therefore it would be difficult to discern leadership behaviour among the associations examined. Secondly, the remedial legislation which was the result of this process of public policy evaluation, was characterized by important regulatory elements (see Chapters 14 and 15) which were not included in the recommendations of any shippers' association. Therefore the legislative outcome in several respects could not be seen as a direct result of the lobbying input of a leading shippers' association(s). This is not to infer however that the government decision-makers did not draft the new legislative provisions as a consequence of the collective lobbying efforts made by this constituencies.

ENDNOTES

32. *In Railway Legislation and Rate Contracts in Canada and Australia*, Lande, R.J., (Bureau of Transport and Communications Economics, Australian Government Publishing Service, Canberra, 1988), it is noted that Australian shippers have very few lobbying associations and the Australian rail legislation includes few rate appeal mechanisms. The possible relationship between effective lobbying and the existence of such associations may have important ramifications.
33. *It was often the practice of the Canadian railways to take advantage of this same impression of shipper association representational legitimacy. A method employed would be to gain the consent by the railways of a few shippers' association executive committees regarding a particular policy issue and then infer in subsequent government submissions that many of the shippers in that industry were in agreement with the rail proposal pertaining to that issue.*
34. *The APTC had a Board of Directors, ten of whom were appointed by the Atlantic Provinces' Chamber of Commerce and ten appointed by the four provincial governments of Atlantic Canada.*
35. *Position paper of the Atlantic Provinces Transportation Commission in respect of enquiry into the impact of U.S. deregulation by Canadian Transport Commission, Moncton, New Brunswick, September 21, 1984, p. 3., as well as interviews in Halifax with Mr. C. Dickson and Mr. R. Armitage, former and present APTC general managers in 1983.*
36. *Interview with Mr. K. Hering and Mr. J. Bramer, general traffic manager and distribution manager respectively for Volkswagen Canada, at Scarborough, Ontario in May and August 1988. Over 70% of Volkswagen sales traditionally occurred in the provinces of Quebec and Ontario; therefore the demand was such that it was not practical for the Volkswagen supply vessel to dock at the west coast Port of Vancouver.*

37. This section subsequently became, without alteration, S.148 of the National Transportation Act, 1987.

38. The Halifax Board of Trade submitted a brief to this effect re CTC Inquiry on Impact of U.S. Deregulation on Canadian Carriers and Shippers, presented in Halifax, Sept. 21, 1984.

39. Recognizing that it may require considerably more information before accepting the argument that a few transportation managers could draft, at their occasional meetings, public policy responses on behalf of one of Canada's most highly regarded pressure groups, I must briefly refer to my own personal experience as chairman of the Transportation Committee of the Canadian Chamber of Commerce from 1983-1985. The Canadian Chamber had a structure somewhat similar to that of the Board, except on a national scale rather than at a municipal level. The Chamber officially represented the boards of trade or chambers of commerce of every town, city and province in Canada and thus could claim to speak on behalf of hundreds of thousands of businesses.

During my term with CP Rail, I was nominated as chairman of the Chamber's Transportation Committee upon the retirement of Committee chairman, Mr. J. Cargill, vice-president, transportation for Maple Leaf Mills, due to the inability of the committee's vice-chairman, Mr. D. McCalden, general traffic manager of Sears Canada, to find the necessary time to assume the duties of the chair. The committee consisted of approximately 12 persons, some of whom, like Mr. McCalden were too occupied with their daily occupations to attend meetings, while others were familiar primarily with different transport modes other than rail (for example, ferry service).

The full-time staff of the Chamber would facilitate whatever directives came from the Transportation Committee. For example, they organized supper meetings so that the Transportation Committee could meet the Canadian Transport Commission executive, and arranged for talks with MP's as well as senior civil servants involved with transport issues. Although the staff provided an unparalleled entrée into political and bureaucratic circles, they did not consider it their role to assist in the formulation of transport policy.

It thus fell upon myself as chairman of the Committee to write the rail policy position papers which would subsequently be seen as the views of the Canadian Chamber of Commerce. Had I wished to appoint new Committee members from those shippers who were known to be of the view that rate transparency, collective rate-making and long-term railway financial viability were in the public interest, neither the staff nor the existing membership of the Committee would likely have objected.

40. Submission of the Board of Trade of Metropolitan Toronto, re CTC Inquiry on Impact of U.S. Deregulation on Canadian Carriers and Shippers, presented in Toronto, 1984.

41. See Part I, endnote 20.

42. The Council additionally conducted its international marketing research and lobbying activities on behalf of certain affiliated groups in B.C., such as the Northern Interior Lumber Association, the Caribou Lumber Manufacturers Association, and the Interior Lumber Manufacturers Association.

43. Symptomatic of this sentiment of "western alienation" was the frequent comment by Mr. G. Bennett, V.P. Transportation for COFI, that the Ontario-headquartered shippers' associations, such as the Toronto Board of Trade, CMA and CITL were not the real wealth-producers of the nation. He casually referred to them as "chocolate-makers", inferring that Eastern Canadian manufacturers (including Neilson's, Nestlé, Cadbury-Schweppes) should have less impact upon the public interest as it related to transport issues.

44. CTC submission of COFI to Railway Transport Committee, CTC, Regarding Inquiry into the Known Effects on Canadian Railways and Shippers of Deregulation of the United States Railway Industry, October 1984, pages 11 et seq.

45. See Chapters 3(a), 5(a) and 9(g) at page 122. As these practices were in contravention of Sections 286, 287, 381 respectively of the Railway Act of Canada, it would appear illogical for COFI, many of whose

members had already accepted rebates, to have recommended continued rate publication.

46. *Comments of Council of Forest Industries of British Columbia: CTC Investigation - Effects and Implications for Canadian Railways and Shippers of the Deregulation of the U.S. Rail Industry, January, 1984, page 4.*
47. *Sixteen Canadian Woodpulp Mills, date of application August 23, 1977; date of decision by Railway Transport Committee of the CTC, August 17, 1979, as well as subsequent CTC decisions May 5, 1981 and January 20, 1982.*
48. *Blanchard, Ghislain "Trucking Deregulation in the United States", Transport Canada, Oct. 1985; Wechsler, Pat "Trucking: A Case Study", Dun's Business Month, May, 1984, pp. 48-51, and Bohman, Ray "Discounts Remain a Key Factor in LTL Pricing", Traffic Management Magazine, Feb. 1986, pp. 25 et seq.*
49. *Op. Cit. #44, page 8.*
50. *CTC File T.D. 14623.5, interview reported Dec. 7, 1983 by R.E. Graham, Senior Adviser, Traffic and Tariffs Branch to D.C. Hackston, Executive Director.*
51. *Section 279 of the Railway Act of Canada (Repealed S.C. 1987, c.34, s.337).*
52. *One major inconsistency with this answer however was another reply to the CITL survey to the effect that 75 percent of the Canadian companies responding would not be put at a competitive disadvantage when their U.S. affiliates negotiated confidential contracts rebates.*
53. *During my interviews with Messrs. D. Long, J. Dion and T. McTague, CITL president, manager - policy and general manager, respectively, in Toronto, 1984, they confirmed that the CITL executive had seriously considered resubmitting yet another survey to the membership due to the poor response elicited.*
54. *Evidence of the CITL in the Matter of a Public Inquiry into the Effects of Rail Deregulation on Canadian Railways and Shippers, September 26, 1984, Toronto, presented by Mr. D. Long, president.*
55. *Survey Finds Shippers Now Favor Deregulation, Cecil Foster, Toronto Globe and Mail, March 5, 1985, page B-15, statement of Position of CITL in the matter of Sections 22 and 48 of the National Transportation Act re CTC Inquiry re Impact of U.S. Rail Deregulation upon domestic and import/export traffic, April 17, 1985, and CITL Submission to House of Commons Hearings on "Freedom to Move", Ottawa, October 31, 1985.*
56. *All of these questionable legal examples of confidential and favoured treatment were occasionally used by the Canadian railways in order to avoid the statutory obligation to publish the full freight charges to shippers. CN and CP Rail more frequently adopted another tactic, i.e., giving rate concessions in "Special Arrangement Tariffs" or "Limited Freight Tariffs", whose publication could be legally delayed and thus not be available to other shippers, for many months. Exceptionally, the Canadian railways adopted unlawful practices, such as not collecting a portion of their billings to certain shippers.*
57. *Submission of Canadian Pulp and Paper Association, CTC Railway Transport Committee in the matter of a request by the Minister pursuant to Section 48 of the National Transport Act, file no. 50264, October 1984.*
58. *Interview between T. Openshaw, manager CP & PA and CTC inquiry officers R. Graham and J. Russel, Winnipeg, October 13, 1983, as recorded in CTC file T.D. 14623.5.*

59. See Part I end note 14 and Chapter 2 (c).

60. This divergence of view is all the more unusual if one considers that COFI and CP & PA shared many of the same members. In a previous submission to the ICC (Ex Parte 427, decision March 5, 1982), regarding the surcharge and cancellation provisions of *Staggers* (49 U.S.C. 10705a), the CP & PA had emphatically stated that the continuation of joint international through rates and not separate proportional rates were essential to their members' marketing their products efficiently.
61. Nor is it apparent that CP&PA members always wished to compete against one another on end product. During an interview with Messrs. C. de Porteous and J. Rancourt, executive V.P. and traffic manager respectively of Kruger Paper in Montreal in July, 1988, I received a standard form industry contract in which the kraft paper of Kruger could be substituted by that of any several competitors such as Consolidated Bathurst or CIP when being sold to customers. Similarly, in an interview with Mr. R. Znoj, distribution manager, Lantic Sugar in November 1988, I learned that Lantic occasionally sold the sugar of its competitor, Redpath Sugar, to the former's customers in times of shortage or when the Redpath refinery was geographically closer.
62. As has been explained in Part I, the ability of U.S. railways such as the Soo Line and the BN to engage in confidential contracting by virtue of *Staggers* in addition to the extraterritorial reach of the U.S. anti-trust laws which caused CN and CP Rail to price independently on southbound international movements had already caused the partial erosion of certain historical rate relationships [see Chapter 4(c)]. The enabling of CN and CP Rail to enter into similarly secret contractual arrangements with Canadian shippers would have further contributed to the elimination of such regional rate equalization on northbound transborder as well as for domestic movements.
63. For example, in a speech given by Mr. K. Thompson, Q.C., executive director of the Office for Regulatory Reform appointed by the newly appointed Progressive Conservative Transport Minister Mazankowski, to the Concordia University Transport Management Center in 1984, the speaker compared the railway industry to the motel industry in its secondary importance to the "real wealth producers of Canada", i.e., the shippers.
64. General Orders T-5 and T-43 (Board of Transport Commissioners, 1965) required the Canadian railways to ensure the full value of merchandise lost or damaged, as measured "from the time and place of shipment". However, in exchange for lower rates, shippers would sometimes agree that the railways not be required to be responsible for full value. For example, certain canned goods manufacturers as well as Honda Motors Ltd. had accepted bills of lading wherein the railways were only partially liable for damage as part of an agreement that their respective freight rate levels would be reduced in consequence. These bills of lading were subsequently approved by the CTC.
65. Such informal agreements between the Canadian railways and a Minister of Transport, although they did not carry the force of law, were not without precedent in Canadian transport history. For example, the late Senator Jean Marchand, then Transport Minister, extracted a promise from both railways that they would not increase rates until the McPherson Royal Commission had completed its public deliberations and had submitted its recommendations to the House of Commons.
66. Submission of the Canadian Chemical Producers' Association to the Railway Transport Committee of the Canadian Transport Commission re Inquiry into Effects of U.S. deregulation upon Shippers in Canada, October 1984, page 7.
67. Interview with Mr. D. Goffin, senior technical adviser, CCPA in Ottawa, February 1985. The diverse relationships between the Canadian chemical manufacturers and their U.S. parent corporations in terms of co-operative or competitive strategies, as well as the generally higher percentage ratio of transportation costs to selling price of product for overseas export markets, further differentiated the CCPA's membership from other Canadian industry associations.

68. *Infra*, Section 60(d) of the National Transportation Act, 1987, (s.c. 1987, c.34). See Chapter 14.
69. CCPA interview with CTC officers Harris and Graham, Nov. 9, 1983, CTC file T.D. 14623.
70. *Op. Cit.* #66, Oct. 1984 CTC Submission, page 10. Also, Submission of the Canadian Chemical Producers' Association to the Railway Transport Committee, Canadian Transport Commission re Inquiry Regarding Impact of U.S. Deregulation upon Domestic and Import/Export Traffic, May, 1985.
71. This point was corroborated by the 1984 submission to the CTC of the Coal Association of Canada, stating that individual shipper/railway contract negotiations would likely place a greater "knowledge burden" upon the producers.
72. In addition to the low profile which transport held within the CMA, even this one position was graded at such a moderate level of remuneration that there was a high turnover of personnel. For example, interviews were conducted at different times between 1980 - 1986 with four individuals who each held the position of manager of transportation, for the association - Messrs. R. Barron, R. Taylor, G. Grey and D. Wiersma respectively.
73. *Supra*, Chapter 4(c); CTC interview by investigators R. Graham and J. Russell took place Sept. 13, 1983 with thirty CMA members in Toronto and was recorded in CTC file T.D. 14623.5.
74. Submission by the Canadian Manufacturer's Association to the Canadian Transport Commission on the effects of the Staggers Rail Act, October 1, 1984, p. 8.
75. See variant to Hypothesis I, as well as the discussion of the position of Atlantic Provinces Transportation Commission.
76. Kahn, A.F., 1971, "The Economics of Regulation", New York, John Wiley, Pub., Stigler, G. 1971, "The Theory of Economic Regulation," *Bell Journal of Economics and Management Science* 2:1-16, Bonsor, N.C. *Transportation Economics - Theory and Canadian Policy*, Butterworth, Toronto, 1984, pp. 137 et seq.
77. Railway Clauses Consolidation Act, U.K., 1845 followed the "Parliamentary train" legislation and prohibited rate differentiation for "the same rate over the same line for the same service". Similarly, the Interstate Commerce Act, U.S., 1889 prohibited rate discrimination and established a supervisory Commission.
78. Similarly, the ICC exempted from economic regulation between 1979-1984 certain other equipment - types and commodities such as Trailer on Flat Car, Container on Flat Car, fresh fruit and vegetables, export grain and coal.
79. Interview with Mr. D. Welford, president of Welco, in May, 1989.
80. This would be an example of an overhead or bridge movement from a Canadian origin to a Canadian destination, with a portion of the haul through the U.S. Moreover, it would be difficult for a Canadian regulatory agency to monitor which loads of lumber destined by rail for a border reload were subsequently being taken by motor carrier to either domestic or U.S. destinations.
81. The CMA also made the following public presentations: Submission to the CTC on the Effects of U.S. Deregulation for Canadian Railways and Shippers, February 1984; Submission to CTC regarding impact upon domestic and import/export traffic, April 1985; Submission to the Minister of Transport on the Transportation Reform Proposals, October, 1985.
82. Other industry pressure groups may be exemplified by the Canadian Fruit Wholesalers' Association (interview with Mr. H. Blommers traffic manager, Dec. 1987, Toronto), the Coal Association of Canada (interview with Mr. S. Hunter, Calgary, January 1988), the Western Grain Association, the Propane Gas Association of Canada, the Canadian Fertilizer Institute (interview with Mr. J. Smith, Montreal, 1984) and the Canadian Petroleum Association

CHAPTER 11:

PROVINCIAL GOVERNMENTS - ANALYSIS OF STRATEGY SELECTION AND POLICY RECOMMENDATIONS

Introduction

Thus far in the thesis, four principle hypotheses have been tested. Hypothesis I examined whether U.S. transport deregulation would likely cause a significant problem of trade and traffic diversion in Canada. Upon this hypothesis having been assessed as valid, subsequent hypotheses were formulated to evaluate, upon logical grounds, what patterns of strategy selection and policy recommendations would characterize different classifications of pressure groups in their respective efforts to have the Canadian government resolve the above problem through legislative amendment.

Hypotheses II and III tested the strategy selection of the individual shippers' classification and it was concluded that many Canadian companies were not, as predicted, in favour of adopting similar pro-competitive statutory measures as had recently transpired in the U.S., but that of those supporting U.S. deregulation, there was a greater likelihood that these companies would fit the large shipper or competitively-located profile. Hypothesis IV examined the strategy selection and policy recommendations of a second category of Canadian pressure group ie. shippers' associations, and it was discovered that this constituent entity of the transportation industry did not co-ordinate, as had been forecasted, their policy planning so as to collectively achieve a cohesive lobbying approach. The third pressure group presently to be analyzed in the light of its members' response to the problem which has been examined at Hypothesis I are the Canadian provincial governments. Building upon the findings of Hypothesis III to the effect that individual shippers would exhibit different strategic positions based upon certain inherent characteristics, this chapter will examine whether another pressure group's strategy selection would also be differentiated according to their respective profile traits.

Whereas the above analysis of the strategies and recommendations of both classifications of individual shippers and of shippers' associations clearly did not provide the officials from Transport Canada with a uniform thread of policy formulation upon which to base legislative reform, another of the purposes of this chapter is to assess whether this next category of pressure group i.e. provincial governments, would prove equally diverse and prone to contradictory proposals.

The constitution of Canada (the British North America Act, 1867, as amended by Constitution Act, 1982), created a federally-styled government structure wherein the provinces, of which there are ten, possess pre-eminent jurisdiction over a wide range of subject matters, such as education and property rights, and share control of other activities under dual jurisdiction, such as immigration and income taxation. Due to this de-centralized nature of the Canadian political system, the central or federal government, based in Ottawa, has oftentimes been politically obliged to give considerable attention to the views of the provincial governments upon matters which are within the former's sole jurisdiction, such as interprovincial railway transportation. For example, any legislation by Canadian Parliament which modified interprovincial economic regulations governing CP, CN Rail would predictably impact upon provincially-regulated railways, such as the Ontario Northland or British Columbia Railway, as well as upon interprovincial trucking movements, authority for which had been delegated by the federal government to the provinces in 1954.⁸³ Thus the ten provincial governments constituted a category of pressure grouping, whose views on transportation issues were treated with an importance which was far greater than their respective constitutional jurisdiction, regional population bases or ruling political party affinity to that of the federal government would typically justify.⁸⁴

One of the important distinctions between this category of pressure group and the two previously described is that a provincial government by its nature has a much more varied industrial base and thus wider representational objectives. Shippers situated in the northern part of a province, characterized by distance from market and dependency upon a sole railway supplier would typically look toward their provincial transport minister to re-affirm their own protectionist views, and would be lobbying against shippers located in the southern part of that same province whose transportation policy recommendations would generally reflect a very different competitive situation. If one adds to the above conundrum, the possibility that by formulating pro-shipper recommendations, a provincial government might be jeopardizing the railway investment and tax base within its own jurisdiction, such as CN or CP Rail jobs and these companies' future real estate or capital investment, it is thus understandable why this pressure group

category would have approached the task of transport strategy selection with considerable caution.

Although it was not deemed useful for the purposes of this analysis to describe the policy recommendations of each of the ten provinces, where certain provincial government positions were selected for review due to their depth, originality and/or contribution to the federal regulatory solution which was ultimately adopted, the analysis has proceeded in a uniform East to West direction for purposes of regional comparison.

The hypotheses which were tested for this pressure group were as follows:

Hypothesis V -That provincial governments would predictably opt in favour of their shippers' policy requirements rather than the opposing recommendations of the railways, given the more important contribution of the former group to regional economic development, taxation and voting power.

Would the provincial governments, when faced with irreconcilable proposals from two of their tax-base constituencies, tend to support the shippers as being more representative of the public interest? The logical underpinning to such an hypothesis is that the provincial transport ministers, being subject to political and regional economic considerations, would predictably consider the impact of a changed national transportation policy upon the thousands of manufacturing and producing companies within their jurisdiction rather than upon two large Canadian railway companies. Alternately, would the provincial transport department's own policy agenda take precedence over any such predisposition to favour the industrial sector? A variant to the above hypothesis would be that provincial governments would neither pursue as aggressive nor as specific programs of policy formulation as shipper or rail protagonists, given the much wider representational goals of such political entities and their exposure to voter sub-group alienation.

As interprovincial and transborder rail policy was a matter of federal jurisdiction constitutionally, it may have appeared to the provincial governments that the political risks of selecting a detailed set of policy reforms outweighed the advantages. As such, it would be reasonable to assume that the provincial governments would predictably have an interest in qualifying their recommendations to engender general statements of policy objectives, while avoiding the specificity which could lose them future votes from groups of shippers whose proposals would not be supported.

Hypothesis VI -That those provincial governments in which the majority of shippers were locationally dependent upon only one railway would favour a more protectionist national transportation policy, since the deregulatory benefits of greater competition between two Canadian carriers would not likely apply to them.

The logic used in support of this hypothesis was that those provinces whose shippers generally would not be able to benefit, due to captivity, from the discounted transportation charges which enhanced competition would cause between Canadian railways, would probably not be in favour of deregulatory amendments to the national transport policy.

Would there not logically be a differentiation in strategy selection between provinces based upon whether their respective shippers would benefit from intra-modal rail competition in the context of deregulatory reform? Canada's western provinces typically featured producers of bulk resource materials which had access to only one railway and were hundreds of miles away from a second railway. By contrast, central Canada was characterized by manufacturing firms situated in cities with access to two or more railways. Pro-competitive legislative reform similar to Staggers would thus affect the provinces' shipper constituencies differently. Would the provincial governments policy recommendations reflect this factor?

A variant of the above hypothesis was that provincial governments would predictably be more concerned in their respective policy positions over the rights of small or captive shippers located in their northern regions than the shippers close to the U.S. border, the latter having greater access both to the trucking mode and to the greater rail transport options available within the United States.

The Canadian provinces had historically favoured transport policy options which protected small, distant and/or captive shippers through regional rate equalization programs. In this manner, industry would not be penalized by significantly higher transportation costs when locating in the northern areas. Would the provinces continue to regard such regional economic development objectives in their transport policy recommendations as priorities, even though this might dilute the efficiencies which their southern Canadian shippers would derive from the price and service benefits of a greater number of competing transport suppliers?

a) PROVINCE OF NOVA SCOTIA

The Province of Nova Scotia is one of Canada's three most easternly provinces, the other two being Prince Edward Island and Newfoundland, all of which are serviced exclusively by Canadian National

Railway or its affiliated intermodal and ferry connections. These Atlantic or "Maritime" provinces are generally resource commodity-based in their rail transportation requirements (for example forest products, coal, potash, fish meal) and they cumulatively have not accounted for satisfactory revenue levels to CN due to historically light tonnages and low profitability of traffic handled. The strongest cargo potential in the region had customarily been exhibited by the Port of Halifax, the capital city of Nova Scotia, due to freight imported from and exported to Europe. However, as trade had taken on a greater importance with Pacific Rim nations, the volumes of traffic routed through Halifax had diminished since the 1970's (for example, demand for Volkswagen, Saab, B.M.W., Jaguar through Halifax vs. Nissan, Toyota, Honda, Mazda through Vancouver, British Columbia).

The Province of Nova Scotia did not make any public recommendations until September, 1984, perhaps due to the above-described susceptibility of alienating one or more of its constituent power bases. Once the provincial Department of Transportation decided that the government of Nova Scotia could no longer refrain from participating in the debate over the future of Canada's rail transport system, they proved to be adamantly opposed to the inclusion of confidential contracts into any new regulatory structure, either for Canada/U.S. traffic exclusively (as the Canadian railways were suggesting) or for Canadian domestic traffic additionally (as certain shippers and shippers' associations had proposed). The reasoning for this position favouring the legislative status quo was enunciated by the Minister of the Department of Transportation for the Province of Nova Scotia, the Honourable J. MacIsaac:

There does not seem to be any good reason to allow Canadian railways to enter into confidential contracts with shippers where the goods originate in and are destined to points in Canada. While confidential contracts could be of benefit to many Canadian industries, it must be recognized that the benefits would accrue in the main to those companies with locations fortunate enough to be served by two railways. This would give an unfair advantage to certain companies located in certain parts of the country and would be of no particular advantage to Nova Scotia where we only have one railroad. ⁸⁵

Nova Scotia supported the position not to permit international confidential contracts, by stating that it would be counterproductive to the CTC public interest if Canadian railways would be required to increase their domestic rates in order to cover losses deriving from lowered price levels on Canada/U.S. movements through the extension of contracts for this category of movement.

There are two apparent weaknesses in this strategy. Firstly it does not appear to come to terms

with the primary objective of the public inquiry, ie. the curtailment of U.S. transborder diversion, a problem to which many Canadian interests had registered protests and which gave every indication of warranting a national solution. By opting for the regulatory status quo, Nova Scotia may have been abstaining from a more direct involvement in what it should have seen as an inevitable process of legislative solution-finding.

Secondly, the heightened U.S. rail competition due to Staggers would likely have placed pressure upon Canadian railways to lower their international rate levels in order to retain longhaul traffic destined to, or originating in, the United States. Whether these decreases in international rates occurred, as has been documented in Part I,⁸⁶ as published tariff reductions, divisional arrangements with U.S. rail subsidiaries, or as confidential contracts, the effect of domestic rate cross-subsidization which Nova Scotia had wished to avoid, would inevitably have occurred. Therefore, the proposed prohibition of confidential contracts on U.S.-destined movements would not have resulted in a stabilization of domestic rate levels, as the Nova Scotian government assumed, since the depth of international competitive pressure would likely take precedence over that particular form of Canadian regulatory response.

The Nova Scotia submission further stated that if confidential contracts were ever to be permitted within Canadian railway regulation, this should only occur when concurrent legislation allowed for CP Rail to access the Port of Halifax by having its trains run directly over the trackage owned by CN to and from the Port. This qualification by Nova Scotia was unfortunately misguided due to the fact that such joint running rights provisions had been in the Canadian railway legislation since the turn of the century.⁸⁷ The reason why the Nova Scotia Department of Transportation may have been unaware that the very legislative provision which they were requesting already existed in the Railway Act, was perhaps due to the long-standing practise by CN and CP Rail of not competing against one another.⁸⁸ Since CP Rail, in pursuing an oligopolistic market sharing policy, in part due to the fear of retaliation by CN, had never wished to make use of the joint running rights provisions which would have enabled it to gain direct access to Halifax, the Nova Scotian officials may have been under the misconception that this lack of competitive intention was due to a legal inability to compete, attributed to the absence of joint track usage provisions.

Nonetheless, this unnecessary legislative proposal by the provincial government of Nova Scotia in favour of joint running rights is symptomatic of the more fundamental weakness exhibited in other transport policy recommendations⁸⁹ to the effect that by simply creating regulation which would allow the rail carriers to compete, this would not sufficiently encourage them to change their collusive practises

or mentality. The above-described flaw of expecting permissive rather than prohibitive regulation to change ingrained behaviour patterns among oligopolistic suppliers, may well have constituted the reason why the Canadian legislative solution (to be discussed for example at Chapter 15) to the problem described in Part I, may ultimately have proven ineffective.

A final notation with regard to the CTC submission of the Province of Nova Scotia related to their complaint that CN had paid a secret 7% rebate to Cast Container Services on Westbound cargo from the Port of Montreal to Chicago. This unlawful rebate arrangement, which had caused considerable controversy in the press due to the fact that CN, a Crown corporation had been implicated, had prejudiced the Port of Halifax as it had given one of its customers a price incentive to route traffic via a competing port. What was significant in relation to this incident was the Canadian Transport Commission's decision not to prosecute CN Rail given that too much time had allegedly passed between the initiation of the rebate agreement in 1979 and the date when it was subsequently uncovered in 1984.⁹⁰

It has previously been postulated that regulations cannot achieve their intended objectives if the regulatory agency is not seen as actively monitoring and enforcing the legislation through implementation of whatever penalties have been woven into the fabric of the law. This above-mentioned case denotes once again that the leniency and non-activism of the CTC, which had perceived its role as advisory rather than as a policing body, and thus had served to render the legislative intent ineffective. Instead of taking some responsibility for the lateness of the discovery and setting stiff penalties for what could only be seen as a clear contravention of the anti-rebating provisions at Section 381 of the Railway Act of Canada, the CTC, by the above decision, sent the very opposite signals to the transport industry, with foreseeable precedent-setting implications. It is also perhaps demonstrative of the non-litigious corporate culture of the Canadian transport community that the Port of Halifax or its steamship line and freight forwarder clientele did not sue CN in the civil courts for the many millions of dollars in damages which this illegal rebate program had perhaps caused them to lose.

b) PROVINCE OF NEW BRUNSWICK

The Province of New Brunswick is also one of the Maritime provinces (within Atlantic Canada) and its commodity mix of forest products and import/export container traffic is practically identical to that of Nova Scotia. The capital city of this province is Saint John, whose port facility competes directly with the Port of Halifax, with the following important qualifications. Firstly, although both CN and CP Rail

trackage physically extend into New Brunswick, the Port of Saint John has, perhaps through a historical market-sharing arrangement between the two carriers, been traditionally regarded as a port serviced primarily by CP Rail.⁹¹ Secondly, the Port of Saint John is further inland than the Port of Halifax, which has given the latter an advantage of being accessible, in less navigable time, to heavier deep water sea-going vessels during all twelve months of the year (similar efficiencies to U.S. coastal ports of Norfolk, Virginia and Savannah, Georgia).⁹² However, the closer proximity of Saint John to central Canadian markets had conversely meant lesser transit times by rail or truck from this port to Montreal or Toronto markets (and vice versa).

One of the most critical complaints by the Port of Saint John was with regard to the previously mentioned policy of rate groupings and gateway equalization⁹³ which had been adopted by both Canadian railways through the mechanism of their established practise of collective ratemaking. Freight rates for whatever tarified commodity from or to the Ports of Saint John or Halifax were identical, despite the facts that a) each port was potentially serviced by a different railway and b) the relative distances involved from/to the same inland origin/destination (ex. Toronto) would have made the Port of Saint John 300 miles closer than the Port of Halifax.

The Saint John Port Development Commission attributed this practise of "port parity" as having constituted an unjustified economic subsidy by the railways and the federal government to the exclusive benefit of the Port of Halifax. This Commission therefore recommended that the existing provision of the Railway Act which had permitted collective rate making (Section 279) be abolished and that confidential contracts on both domestic and import/export traffic be allowed within the new Canadian railway regulations.⁹⁴

Although this strategy postulated by the Port of Saint John appears to have been consistent with their economic interests, it is questionable as to why they could not have taken some protective action against the gateway equalization policy of the Canadian railways during the decades prior to 1984. The strength of their submission seems to have been jeopardized by the fact that Saint John would have remained the long-standing victim of the railway equalization practises for so many years without ever having attempted any of the following recourses:

- 1) actively encourage one of the two railways accessing their port to lower their rates so as to reflect the shorter distances to central Canadian markets as compared with Halifax origins.
- 2) initiate a public interest appeal by virtue of Section 23 of the National Transport Act, 1967,

contesting the regional rate grouping policies of the railways as constituting preferential treatment of a competing port.

- 3) have the CTC investigate whether certain rates from Halifax were non-compensatory (given the additional 300 miles at no supplemental cost), contrary to Section 276 of the Railway Act.
- 4) demand that Consumer and Corporate Affairs Canada hold an inquiry into the alleged collusion and anti-competitive pricing and market-sharing policies by CN and CP Rail, contrary to Sections 32 and 34 of the Combines Investigation Act.

Yet, in the same way as certain shippers' associations as the CITL and the CMA experienced a dramatic change of policy in 1984, in that they suddenly reversed their previous positions regarding collective ratemaking and confidential contracts, it may be inappropriate to fault the Port of Saint John for not having vigorously protested the issue of port parity in earlier years.

One could theoretically describe the transport industry environment as including the following regulatory structures and behavioural patterns within a pre-and post-Staggers continuum:

TABLE XXX

FEATURES OF NORTH AMERICAN TRANSPORT REGULATORY ENVIRONMENT

1960-1979	1980-1987
PRE-STAGGERS ENVIRONMENT	POST-STAGGERS ENVIRONMENT
1) Canadian and U.S. railways practicing collective ratemaking on all rates.	1) U.S. railways being prohibited from engaging in collective ratemaking.
2) Shippers participating in collective rate negotiations whereby they would all receive the same rate levels per commodity group.	2) Many Canadian shippers receiving secret rebates from U.S. carriers and/or losing certain markets to U.S. shippers due to confidential contracts.

1960-1979**PRE-STAGGERS ENVIRONMENT**

- 3) Railways constituting prominent voice in setting Canadian transport policy. Shippers accepting their secondary role in policy formulation.
- 4) Shippers generally not contesting railway pricing decisions by initiating litigation before the CTC.

1980-1987**POST-STAGGERS ENVIRONMENT**

- 3) Election of Conservative government and stated objectives of new Transport Minister to change the existing legislation in favour of shipper views and market expansion of the users of transportation services.
- 4) CTC public inquiries into impact of Staggers upon Canadian shippers, and shippers' associations being called upon to develop policy recommendations regarding remedial legislation.

In explaining the relationship between regulatory structure and patterns of behaviour by regulated groups, item no. (1) of the above diagram shall be employed as one example of the above four elements, i.e. the ability by railways to price their services collectively. It will be examined how this one structural element within the 1960-1979 regulatory framework would have caused different groups to regularly weigh their level of satisfaction as compared with the benefits which other categories of pressure groups were perceived to derive from this regulatory structure's existence. This same process would have occurred as regards items (2), (3), or (4). When the legislative feature changed for U.S. shippers and U.S. railways in 1980, pressure group categories (A) to (E) identified in the following table would have continued to assess the new regulatory balance and identify what behaviour was then appropriate:

TABLE XXXI

BEHAVIOURAL FORMATION AND ITS RELATIONSHIP TO REGULATORY DEVELOPMENT

1960-1979	1980-1987	NATIONAL TRANSPORTATION ACT, 1987
PRE-STAGGERS	POST-STAGGERS	
1) Canadian and U.S. railways practicing collective rate-making on all rates.	U.S. railways being prohibited from engaging in collective rate-making.	Canadian railways being prohibited from engaging in collective rate-making.

A) CANADIAN SHIPPERS' ASSOCIATIONS

- a) observing this collective ratemaking practise,
- b) evaluating the benefits and disbenefits upon their respective companies,
- c) deciding whether to re-enforce tacit acceptance of this practise's continuation,
- d) evaluating benefits and observing patterns of regulatory activism by other groups.
- Strategy Selection and Policy Recommendations
-
- ```

graph LR
 A[a) observing this collective ratemaking practise,] --> D[Strategy Selection and Policy Recommendations]
 B[b) evaluating the benefits and disbenefits upon their respective companies,] --> D
 C[c) deciding whether to re-enforce tacit acceptance of this practise's continuation,] --> D
 D[d) evaluating benefits and observing patterns of regulatory activism by other groups.] --> D

```

This behaviour-determinant process is concurrently re-enacted by:

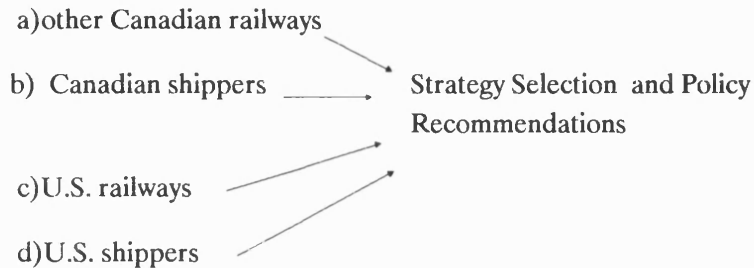
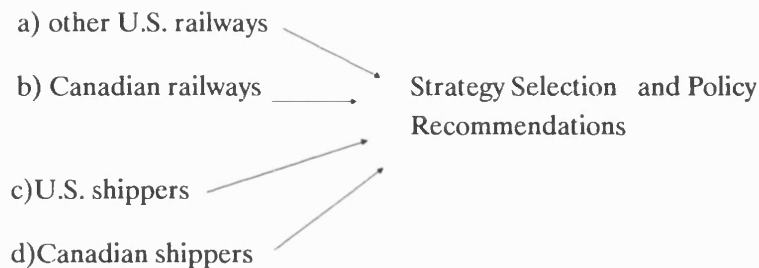
| 1960-1979           | 1980-1987            | NATIONAL<br>TRANSPORTATION ACT,<br>1987 |
|---------------------|----------------------|-----------------------------------------|
| <b>PRE-STAGGERS</b> | <b>POST-STAGGERS</b> |                                         |

## B) INDIVIDUAL CANADIAN SHIPPERS IN RELATION TO THE IMPACT AND BEHAVIOUR OF REGULATORY FEATURE UPON:

- a) other Canadian shippers
- b) U.S. shippers' competitors
- c) U.S. railways
- Strategy Selection and Policy Recommendations
- 
- ```

graph LR
    A[a) other Canadian shippers] --> D[Strategy Selection and Policy Recommendations]
    B[b) U.S. shippers' competitors] --> D
    C[c) U.S. railways] --> D
  
```

1960-1979	1980-1987	NATIONAL TRANSPORTATION ACT, 1987
PRE-STAGGERS	POST-STAGGERS	

C) CANADIAN RAILWAYS RE:**D) U.S. RAILWAYS RE:****E) U.S. SHIPPERS ...**

Thus for each of the above three time-frames and upon each of the regulatory developments exemplified by Items (1) to (4) of the post-Staggers era (Table XXX, second column), Canadian shippers would continuously assess their relative strategic position both individually and collectively in relation to other Canadian shipper groups, Canadian railways, U.S. shippers and U.S. railways. Similarly, pressure groups (C), (D), and (E) would be sensitive to the acturism or passivity of strategies selected by other constituents within their respective environments. Thus, this process of assessment would focus not only upon the economic impact of a given regulatory development, but also upon the lobbying activism of other groups which may have preceded the regulatory development or have been in response to it.

For example, the fact that the Port of Saint John had never before protested what had constituted for its users such a prejudicial commercial practise by the railways as market-sharing, may well be related to the similar environmental element of Canadian shippers generally not having previously objected to their secondary role in Canadian policy formulation, or having appealed railway pricing decisions to the CTC so infrequently (Table XXX, first column, Item no. 4) in that all of these behavioral patterns reflect

an unwillingness to engage in regulatory activism as well as a certain tendency among users of transportation service of accepting the status quo.

It is not the objective of this thesis to discern whether this noted resistance to protestative behaviour was a result of years of passivity having created an ever increasing momentum and barrier against more activist regulatory patterns of response, or whether it was a reflection of similar non-protagonistic lobbying practises on the part of other pressure groups or in the alternative, whether it was a result of a Canadian cultural pre-disposition to avoid litigation.

However, the following preliminary conclusions may be drawn. The formulation of strategy is not solely a function of the economic consequences of a particular regulatory development upon a pressure group, but also of the attendant expectations of members for the pressure group to react according to what they perceive to be acceptable patterns. These behavioral patterns are likely derived from a combination of economic, political and psychological factors, such as the satisfaction level with the current regulation, the previous regulatory response practices of other groups, as well as the lobbying activism (or lack thereof) of competitors.

One could therefore postulate that the heightened activism which the Canadian railways demonstrated in 1983 by requesting the Transport Minister to change the law so as to resolve the problem of long-haul transborder traffic diversion, as well as the uncustomarily vocal lobbying practises which U.S. shippers' associations adopted between 1978-82 in order to persuade Congress to enact and then fine tune Staggers, may have created the protagonistic behavioral precedents which prompted certain Canadian shipper and port pressure groups to change their passive regulatory pre disposition.

Secondly, there appears to be a greater likelihood that a combination of regulatory developments, such as post-Staggers occurrences 1-4 outlined in the Table XXX, will cumulatively induce change to the legislative and behavioural status quo, rather than a singular incident per se.

c) PROVINCE OF QUEBEC

Despite the fact that Nova Scotia and New Brunswick were in obvious disagreement over the question of whether the Canadian national transport policy should be amended so as to permit confidential contracts, both of their lobbying positions were intended to be representative of the shippers within their jurisdictions. By contrast, the Province of Quebec, whose population, area size and railway track mileage

were all several times larger than either of these Atlantic provinces, pursued a strategic direction which viewed its role as supportive of the economic interests of the Canadian railways.

The Quebec Ministry of Transport's Rail Division, in 1983 submitted that the geography and economics of the railways in Canada differed too greatly from that of the U.S. to warrant adopting the Staggers formula of deregulation.⁹⁵ The Quebec government representatives explained that railway traffic flows through their province were divided into the following two categories, for U.S.-destined commodities:

- a) traffic originating either in Quebec, in other parts of Canada or in the U.S. (overhead) and proceeding along the main transcontinental lines of CP Rail or CN through Montreal and thence southward to the U.S. border.
- b) traffic originating within the province's northern pulp and paper producing or mining towns and being routed via the regional branch line networks of CP Rail and CN directly into the North-eastern States, without passing through Montreal.

With regard to the first category, the Quebec officials stated that if the Canadian railways continued to lose substantial amounts of long-haul international traffic (for example, from B.C. to New York via Montreal) and overhead traffic, this would have a critical effect on the justification for the continuation of rail transportation access given to local Quebec "main line" shippers whose products may only have constituted a marginal profit contribution to the railways.

As to the second category, the regional lines did not additionally handle domestic transcontinental traffic or international through traffic. Given that their viability was thus entirely dependent upon maintaining a high level of exports of such local products as semi-finished newsprint from Northern towns, the Quebec representatives were concerned that the confidential rebating practises of U.S. railways would cause a transformation of traditional routing patterns, consequently jeopardizing the province's somewhat precarious economic balance which had hitherto supported the CN and CP Rail secondary lines. For example, two U.S. railways, Conrail and the Delaware and Hudson (hereinafter referred as the D & H),⁹⁶ extended directly from the Northeastern States into Montreal. Price-cutting tactics by these U.S. railways, prevalent since Staggers, had already encouraged some Northern Quebec newsprint shippers to commence trucking their product from their mills to the Montreal area so as to then connect with the Conrail or D & H rail networks, due to long haul rebate incentives offered by the latter, instead of their customary usage of the regional rail lines of CP Rail and CN, whose track infrastructure extended directly into the

Northeastern states.⁹⁷

In order to appreciate the unusually high level of fixed costs which Canadian railways were expected to absorb in order to fulfil their common carriers' obligations in servicing Northern Quebec, consider that a regional rail movement from the Abitibi region of the province would necessitate crossing approximately 300 miles of uninhabited territory en route to the nearest U.S. destination. Therefore any significant loss in traffic revenue from such northern origins, given the maintenance costs of such a long expanse of trackage, would convert a marginally compensatory movement into an unprofitable venture which the railway would likely wish to abandon.

The continued viability of this regional rail line network was not only a concern of Quebec because it provided an essential services line and employment base to many northern communities, but also due to the politically-motivated belief that this "patrimony" would one day constitute the transportation infrastructure when the province eventually declared itself a separate country, as the Parti Quebecois provincial government continuously proposed.

It is thus somewhat ironic that a provincial government which was espousing political independence should become so closely allied with the policy recommendations of Canadian Pacific, whose transcontinental railway construction in 1867 was widely believed to have accounted for Canada's very creation as an east-west nation, distinct from the United States. It is even more surprising that the Canadian railways regarded Quebec's support of their proposals as so significant, if one considers that an eventual political separation by Quebec would perhaps lead to the "nationalization" of the CN and CP Rail trackage within the Quebec borders and the consequential break-up of both transcontinental systems.

Nonetheless, in its 1984 submission to the CTC on the impact of U.S. deregulation,⁹⁸ Quebec proved to be the only province in Canada which supported verbatim each of CP Rail's five transport policy recommendations (see Chapter 10(g)). Quebec wholly adopted the above-mentioned five-point plan of the Canadian railways without ever fully evaluating whether such proposals would prove to be consistent with their provincial government's own socio-economic policy or the negative impact such recommendations could predictably have upon their numerous shipper constituency.

For example, Quebec proposed that the federal transport policy be amended so that Canadian rail carriers be given the legislative option of unilaterally cancelling routes or imposing surcharges upon whichever routes the railway designated in order "to negotiate on an equal footing with their American rail competitors." This position, which constituted the mere repetition of one of the elements of the CP

Rail proposals, should have posed the following immediate and fundamental concerns to the Quebec strategists prior to their assimilation of it into their provincial policy recommendations:

- 1) it was most unlikely that such a regulatory solution to the problem of U.S. railways being permitted by Staggers to cancel their less profitable international routings in order to favour their own longhauls would be politically acceptable to Canadian government decision-makers, as the great majority of Canadian shippers and their associations had specifically indicated their opposition to such a legislative amendment.
- 2) the recommendation itself was "ultra petita" ⁹⁹ given that it would have applied to both domestic and international traffic, even though it was meant only to be a means of preserving international route negotiations between Canadian and U.S. carriers.
- 3) the prospect of Canadian railways lawfully surcharging or cancelling routes at their discretion would have undermined the entire structure of existing regulatory protection afforded to shippers to appeal in the public interest discriminatory pricing decisions, contraventions to common carriers' obligations, or branchline abandonments.

Similarly, the Quebec Department of Transport mirrored another controversial CP Rail proposal by recommending that both Canadian railways have access to each other's international contracts with shippers.

It was not for having adopted a partisan position per se, but rather its unquestioning acceptance of self-serving points of the railway plan such as these, which may ultimately have weakened the credibility of the Quebec strategy. The concept of mutual railway access to confidential contracts had been devised in 1983 by Canadian Pacific as a means of countering the practise of U.S. railways from secretly discounting their international contracts based upon a transparent Canadian tariff and of concurrently ensuring against a rate war developing between Canadian National, the Crown corporation, and itself. This recommended legislative solution should however have manifested the following basic difficulties to Quebec ministerial officials, who were customarily attuned to the exigencies of political compromise:

- 1) it was in contravention to the U.S. extraterritorial anti-trust doctrine [see Chapter 4(c)].
- 2) it would, in all likelihood, be unacceptable to shippers who would not wish to participate in a charade of confidential contract negotiations only to have the other Canadian carrier inspect the resulting/price service arrangements which the shipper had concluded with the carrier selected.
- 3) it would have created an artificial regulatory distinction between domestic and international

traffic.¹⁰⁰

- 4) it would be regarded as a device to prevent competition and preserve the collective ratemaking regime, at a time (1984) when most pressure groups in Canada wanted some change to the status quo.

In conclusion, it may have been a more effective strategy for Quebec to have presented an original series of recommendations, ultimately favorable to the Canadian railway position, and to have justified them with concerns which were of equal importance to shippers. For example, in its 1983 letter to the CTC, the Quebec Transport Ministry described the downward spiral of local economic activity which would predictably result from a continued diminution of international and overhead traffic flows attributed to Staggers. By having focused upon such forecasting of reduced train frequency, with its negative implications for providing supplies to northern communities, heightened pressure upon the Canadian railways to increase their rates on remaining traffic so as to offset the loss in transborder revenues, as well as the improbability of new industrial investment in those areas which were exposed to such erosion of competitive rail service, the Province of Quebec hypothetically could have pursued a more balanced strategy in its 1984 recommendations without being seen as disenfranchising shipper interests.

d) PROVINCE OF MANITOBA

An entirely different regulatory solution to that recommended by Quebec was proposed by the Government of Manitoba, even though both provinces viewed U.S. rail deregulation as having essentially negative consequences upon their respective jurisdictions. The Manitoba Department of Transportation stated that their province was in a very different economic situation to that of the more industrialized regions in Canada, in that it encompassed mostly agricultural shippers who were served by only one railway, transported their product domestically on an east-west traffic matrix and therefore were unable to benefit from the competitive pressures derived from Staggers. The Province's reasons for favouring the preservation of stringent economic regulation of railways as being the hallmark of Canadian national transportation policy were succinctly elucidated in the following remarks of the Honorable John Plohan, Transport Minister for Manitoba.

"In a deregulated environment, carrier discrimination and pricing selectivity between commodities can be expected to become increasingly prevalent once the demand for transport services exceeds the available supply. Thus, claims of discrimination may be expected to

increase as the economy begins to recover and the demand for rail service accelerates.

As a matter of policy, the province of Manitoba opposes any statute that promotes unjust discrimination between shippers or regions. Freight rates must meet developmental needs in the interest of economic diversification and job creation. This is not possible in an environment which allows the railways to take undue advantage of monopoly situations."¹⁰¹

Manitoba thus envisaged the role of the railway as that of an instrument of public policy, rather than the divergent Staggers ideology of a private commercial enterprise, and in consequence was negatively disposed toward extending rail carriers the latitude of independently pricing their services based upon differential market demand. The interventionist strategy which this province proposed would require railways to guarantee rate equality for all Canadian regions and shippers, irrespective of a firm's size or specific locational advantage.

In their submission to the Canadian Transport Commission in 1984, the Government of Manitoba was predictably opposed to both confidential contracting and rebating for either domestic or international traffic, as such amendments would promote preferential treatment of certain shippers (and regions) over others.¹⁰²

This provincial government's representatives supported the above policy stance by stating that confidential rate agreements between shippers and carriers would undermine the obligatory publication of tariffs, which regulatory structure had provided the basis for shipper redress against unjust discrimination, through the existing public interest appeal mechanism (Section 23, National Transportation Act, 1967),¹⁰³ as well as the maintenance of rate groupings which had greatly assisted in the development of several resource commodity sectors.¹⁰⁴

This strategic direction pursued by the Province of Manitoba could perhaps have been challenged on the following grounds:

1. Although a regional affirmative action program through regulatory intervention would result in a small or distant shipper receiving the identical rate levels as another with greater size or positional advantages, can it be argued as being equitable to deprive the latter of its natural market advantage? Quare: Does the larger or more proximate shipper not have a greater economic right to certain markets?
2. The cross-subsidization necessary to achieve such rate equality would likely deprive the Canadian railways of profits, which would have constituted a long-term systemic weakness.

3. To the extent that Canadian and U.S. shippers were vying for many of the same markets, the artificial equalization of regional Canadian tariffs¹⁰⁵ would make the latter less competitive as compared with existing U.S. rate differentiation encouraged by the provisions of Staggers. Thus, the more innovative Canadian shipper, by having any possible rate preference neutralized as against other Canadian shippers would ipso facto lose potential markets to U.S. shippers, who could exploit their inherent competitive advantages unimpeded by any similar U.S. regulation intended to ensure uniform rate standards.

Despite the above policy questions, Manitoba pursued a consistent if not somewhat dogmatic strategy by rejecting any consideration of lessened government intervention, even when certain exceptions to its selected position appeared to have been economically warranted or would have at least permitted consensual compromise with other pressure groups for tactical purposes. For example, of all the individual shipper, shippers' association and provincial representations, Manitoba was the only opponent of the railway recommendation that Canadian transport legislation not require tariff publication on overhead traffic (U.S. origin to U.S. destination through Canada). It has already been established in Part I that the Canadian railways were losing considerable revenues due to this facet of disharmony in regulation between Canadian and U.S. law.¹⁰⁶ However, as overhead traffic volumes involved what was essentially a U.S. domestic transportation issue, it would not appear to have constituted a significant concession to Manitoba's strategic consistency to have accommodated the mainstream of Canadian policy recommendations in favour of deregulating this one aspect of Canadian railway legislation. Even though such a concession would not be expected to cause the Canadian railways to have become more conciliatory with regard to Manitoba's policy agenda in return, due to the lack of political power which any one province [especially one with a small population base and non-aligned majority political party in the provincial legislature (New Democratic Party)] could exert upon the process of federal legislative change, it may have rendered Manitoba's policy position less isolationist for it to accede philosophically in those areas where it was unaffected economically.

It has already been demonstrated that the Provinces of Nova Scotia and New Brunswick conceived of their transport lobbying function as representing the interests of their respective shippers, and the Province of Quebec, by contrast, adopted a strategy favouring the opposing interests of the Canadian railways. Manitoba at first glance appeared to envisage its role in policy suasion as being representative, not of either constituent bodies, but rather of its political ideology. Nevertheless, Manitoba may well have

considered its own economic self-interest as significant a criterion in the determination of strategy as did other provincial pressure groups, as the following table suggests:

Table XXXII

FORMULATION OF POLICY RECOMMENDATIONS - PROVINCE OF MANITOBA

ECONOMIC FACTORS	PRO-MANITOBA OBJECTIVE	OPTIONS FOR LEGISLATIVE RECOMMENDATIONS
1.The Railways employed more people in Manitoba (approximately 13,000), as a percentage of provincial population than elsewhere in Canada. ¹⁰⁷	1. To maintain this high level of rail employment within the province.	1.a. Supporting rail recommendations so as to satisfy railway management and ensure railway profitability. 1.b. Augment regulatory control over railway's ability to take potentially negative commercial decisions regarding labour force and plant rationalization.
2.Canadian National operated a northern rail line to the Port of Churchill which the railway wished to abandon due to unsatisfactory utilization.	2.To preserve this rail line so as to serve local northern shippers and facilitate the transportation routing of export grain through this summer port.	2.a. Promote additional regulatory safeguards against rail line abandonment. 2.b.Oppose rail recommendation to implement route cancellations and rate surcharges.
3.Other than grain products, most of which were mostly regulated by special rail statute, there did not exist many remaining railway shippers headquartered in Manitoba. ¹⁰⁸	3.To encourage a rate restructuring so as to enhance regional industrial development.	3.a.Oppose rail and shipper recommendations favouring confidential contracts. 3.b.Support regulatory provisions which would offer shippers increased access to a non-local railway. ¹⁰⁹

Given that most of the above legislative recommendations (Column III) were ultimately espoused by the Manitoba government (with the exception of 1.a), one may conclude that their transport policy formulation was well attuned both to the economic objectives of the province (Column II), as well as their ideological objections to U.S. deregulation.

e) PROVINCE OF ALBERTA

One remaining province whose determination of strategy deserves analysis, in part because it entirely reversed its policy recommendations from 1983 to 1984, as did certain shippers' associations such as the C.I.T.L., and in part because its strategy proved successful, in that many of the concerns which it expressed were ultimately incorporated into the Canadian legislative solution, was the Government of Alberta. This province, rich in oil and gas deposits, had benefitted substantially in fiscal revenues due to the OPEC embargo in the 1970's, with the indirect result that the province's Department of Economic Development had been revitalized with a contingent of researchers and transport policy analysts far exceeding in budget that of any other provincial transport ministry. Alberta had thus customarily taken the lead on behalf of all the Western Canadian provinces in discussions pertaining to policy matters which Transport Canada initiated under the above-mentioned decentralized political process¹¹⁰ of the Trudeau era.

In the initial interview in 1983 with Canadian Transport Commission investigators Graham and Russel, Alberta officials reported that a provincial survey had been conducted which concluded that a majority of rail shippers within the province perceived Staggers to have permitted them to expand their U.S. export markets due to the downward pressure upon rates caused by intramodal competition among U.S. railways. Despite this favourable view of the results of U.S. deregulation, it was stated that most of these shippers did not support modification of Canadian transport legislation patterned along similar lines to that of the Staggers provisions¹¹¹. Alberta was thus initially opposed to confidential contracts being permitted through amendments to Canadian national transport policy, as this would reduce the amount of freight rate information available to its shippers, thereby facilitating preferential treatment being given to certain shippers by the railways, based upon their particular volume and/or distance from market. It has been mentioned that Alberta had previously exerted pressure on both Canadian railways to adopt a pricing policy of rate grouping whereby a given commodity originating or destined to an Alberta point would receive the identical rate anywhere within the province, so as to encourage regional economic development.¹¹² Such a rate equalization program would be rendered ineffective by the freight rate differentiation which would predictably occur if the railways could offer lower confidential contract rates to locations which generated fewer costs due to shorter distance or greater network equipment utilization.

Therefore, in 1983, Alberta opted to maintain the regulatory status quo in Canada, despite the

admitted benefits which Staggers was perceived to have derived for most of its shippers, especially those in the chemical, oil and gas industries. The provincial government appeared to be apprehensive that a lessening of regulatory intervention would result in inequitable treatment by the railways of Albertan shippers both within the province (small vs. large, northern vs. southern) as well as between their province and other regions (western Canadian bulk resource products vs. central Canadian manufactured goods and westbound vs. eastbound rail pricing policies).

One year later, Alberta altered its strategy of favouring the maintenance of intra-/and inter-provincial rate equalization structures by proposing the following regulatory compromise solution: It recommended that new federal transport legislation allow for confidential contracts on Canada-U.S. movements only, but that this exception to tariff publication requirements be complemented by the incorporation into the law of a freight rate arbitration mechanism (see Chapter 13), as well as of reparations¹¹³ so as to concurrently protect the smaller or captive shipper. The reasoning for such a change in policy position was explained in the province's 1984 CTC submission:

*An action in response to the intra-modal rail competition of the Staggers legislation would create winners and losers. The objective must, therefore, be to both ensure those who are able to benefit can do so, and at the same time protect others. However, the Province also stated that it would be inappropriate to deny some shippers the benefits of intramodal competition because other shippers might not benefit to the same extent.*¹¹⁴

Although this shift in Alberta's recommended policy was not unique in that certain shipper associations had already proposed the concepts of reparations and arbitration, nor was it static since this province would subsequently support the notion of confidential contracts on both international and domestic traffic, it constituted a very significant development toward the federal government's achieving a politically acceptable legislative solution for some of the reasons cited below.

Alberta had consistently expressed the view that there existed an historical bias in Canadian railway pricing which favoured those rates given to Westbound manufactured goods produced in Quebec and Ontario over Eastbound bulk resources produced in the Canadian prairie provinces. This directional and product inequality in freight rate treatment was alleged to have inhibited the industrialization of the Western region of Canada, whose shippers generally possessed fewer transportation options due to the comparatively low value of their commodity and greater distance to market. By proposing legislative amendments which, unlike Manitoba's, were situated well within the mainstream of regulatory formulation

from pressure groups across Canada, Alberta was giving indications that its traditional alienation from the national transport policy could potentially be resolved.

The prospect of a respite from this Western Canadian undercurrent of disenfranchisement by previous federal transport regulation, combined with a) the above-described sensitivity by Ottawa to provincial concerns, b) the newly-founded economic strength of Alberta, c) the fact that the federal Minister of Transport in 1984, the Honourable Donald Mazankowski, was himself an Albertan and d) their provincial government having the same political party affiliation as the recently elected federal government, together resulted in Transport Canada's regarding what was a most unoriginal compromise solution of this province as if it were the very program for Ottawa's draft legislation.

For example, the 1984 submission by Alberta to the CTC proposed that railway-shipper confidential contracts, if they were to be permitted by law, be disclosed in full to the regulatory agency, that there be a formal reassessment of the new provisions exempting such tariff publication within five years following enactment of the legislation and that an ongoing review of the impact of such rate confidentiality with respect to Canadian geographic regions be required. Not only did the draft federal legislation (Bill C-126) include all of these recommendations, but the Transport Canada strategists devised an additional legal mechanism which addressed Alberta's above-discussed objective of preserving intra-provincial rate equalization. The "equity appeal"¹¹⁵ permitted any shipper which suspected that its company was being disadvantaged due to confidential rail contract rebates extended to its competitors, to have the regulatory agency, upon favourable investigation, oblige the railway to offer such complainant similar rate discounts.

Alberta had consistently expressed its concern that a majority of its shippers would remain captive to one railway and thus be deprived of the potential benefits of intramodal competition, even if the interswitching limits were extended beyond the then applicable 4-mile radius so as to permit all industrial facilities within city limits to be accessible to two railways.¹¹⁶

The fact that many Alberta mines and liquid petroleum gas drilling or processing installations were situated hundreds of miles away from a point of interconnection between their local carrier's line and that of a competing railway could potentially render these shippers susceptible of bearing the burden of a policy of cross-subsidization by Canadian railways who were being pressured to decrease freight rates on an increased number of competitive intra-city locations.

Once again, Transport Canada created a legislative solution in the absence of Alberta's proposing any specific recommendation, to offset this province's concern regarding geographical captivity by

shippers to a local railway. The federal government proposed the concept known as "competitive joint line rates (CLR's)",¹¹⁷ which enabled any shipper which was situated at an origin or destination local to only one railway, to oblige that rail carrier to transport merchandise to an interchange point with a connecting carrier within 750 miles, at the same rate established by the connecting carrier proportional to the latter's segment of the movement. As a preliminary example of the CLR mechanism, which will be described in detail at Chapter 15, Chart XXXV shows a competitive joint line rate from Medicine Hat to Coutts, Alberta which would be calculated according to the BN rate between Coutts and the U.S. Midwest destination and would thus enable a CP Rail "captive" shipper at Medicine Hat to benefit from intramodal competition between Interchange A (CP-Soo Line) and Interchange B (CP-BN). This expropriatory method of shorthauling one's local carrier (in the diagram, CP Rail) was most vigorously opposed by the Canadian railway lobbyists until the passage of the National Transportation Act in 1987, but the steadfast resistance of the federal government to compromise this controversial mechanism's integrity appears to constitute further evidence of their resolve to support the policy orientation of the Province of Alberta.¹¹⁸

In Alberta's 1984 CTC submission, it was explicitly acknowledged that it would be inconsistent for Canadian shippers to benefit from such increased commercial freedoms as confidential contracting, whereas the Canadian railways would be concurrently restricted from engaging in routing cancellations or trackage divestment, in the same way as their U.S. counterparts were so permitted under Staggers. The Alberta Government then stated that even though such Canadian regulatory inconsistency might place the Canadian railways at a competitive disadvantage, the public interest required that shippers not be prejudicially affected by the recommended amendments to the transport law.

This tenuous conclusion to seemingly exclude the consideration of railway viability from the definition of the public interest, is not surprising in that it has already been documented that certain other provinces may have seen their lobbying roles as primarily representing the interests of shippers, and indeed the Province of Alberta had previously been in favour of such commercially restrictive (for railways) and interventionist policies as the already discussed intra-provincial rate equalization. What remains to be explained is why the federal government would have adopted such a "parti pris" position favourable to but one segment of its wider constituency.

A final example of the predisposition of Transport Canada to anticipate and then formulate the policy position best suited to Alberta's interests may be found in what appears to be the imbalanced and anti-railway attitude which was depicted during the 1984-87 period by the federal transport department.

The inclusion in the draft legislation of the concepts recommended by or for Alberta such as final-offer arbitration, the public interest equity appeal, reparations, CLR's and a greater restriction upon rail line abandonments, added to what attitudinally may be described as a significant bias against customary railway pricing and managerial practice by the federal Transport ministerial officials responsible for the Bill's being publicly explained and processed through its various Parliamentary stages, all denote an unnecessary penchant to disfavour the suppliers of rail transport service in Canada.

Furthermore, the appropriateness of such a strategic decision on the part of the federal government to be seen as insensitive to the interests of one component of the transport industry should perhaps have been reviewed by the Canadian political decision-makers by examining the following two fundamental questions:

1. This pro-shipper legislative solution would inevitably create substantial disharmony with the U.S. Staggers Act, which did not contain such interventionist mechanisms as final offer arbitration, CLR's or the equity appeal. Given that the primary objective of the Canadian regulatory review had been to resolve the problem of diversion of transborder traffic which was perceived to have been caused by the divergence of the two national transportation policies, would the Canadian Bill not be recreating a similar causal problem for future international regulatory disharmony?
2. The Staggers Act had purposefully limited the role of the I.C.C. in order to enable U.S. railways to curb a serious problem of revenue attrition. In contrast, by the Canadian government intensifying the economic regulation of railway behaviour so as to encourage expanded markets for Canadian shippers through controlled freight rate levels and enforced service levels, would the probable financial shortfall caused by Canadian rail carriers not abandoning unprofitable lines and being restricted from charging more than minimally compensatory prices, ultimately result in the necessity for Canadian government subsidization of a weakened railway infrastructure?

Conclusions

In addition to the policy statements and recommendations of the provincial governments which have been herein analyzed, there were several other Canadian provinces, as well as certain ministries of the federal government which equally participated in the process of presenting public submissions with

regard to legislative change. Their views were oftentimes as widely ranging as those of the pressure group members already selected for discussion.

For example, whereas the Province of British Columbia predicted that U.S. rail deregulation would lead to the "de-industrialization of Canada" due to the latter country's branch plants having higher unit costs and their competitiveness being thus further exposed to reductions in U.S. transport costs, the Province of Ontario carefully avoided suggesting any specific modification to the Canadian transport regulatory status quo for fear of causing discontent among one or more of its constituencies. Similarly, whereas the federal Department of Consumer and Corporate Affairs submitted elaborate documentation intended to demonstrate that a representative sampling of 280 Canadian shippers had indicated that increased rail competition and less economic regulation should be implemented in the new national transportation policy,¹¹⁹ the Department of External Affairs recommended that no changes to Canadian transport law were necessary.¹²⁰

Therefore, the transport policy recommendations of the provincial governments proved to be as diverse as those of the other pressure groups which have been evaluated above, such as individual shippers and industry associations. As a consequence of this absence of consensus, the federal Transport Department was seemingly obliged to demonstrate leadership in policy formulation, given that the draft legislation could of necessity not conform to the majority of submissions which had been presented, and would inevitably be in direct opposition to the strategic direction suggested by some of the pressure group constituents.

In assessing whether the two hypotheses which were outlined within the introduction of the chapter have been proven from the evidence presented, the following conclusions may be reached:

Hypothesis V -That provincial governments would predictably opt in favour of their shippers' policy requirements rather than the opposing recommendations of the railways, given the more important contribution of the former group to regional economic development, taxation and voting power. Q.E.D.

This hypothesis appears to have been substantially confirmed from the evidence of the provinces examined. Although the submissions of Nova Scotia, New Brunswick and Alberta differed widely regarding specific regulatory proposals, there can be little doubt that each of these provinces were representing the most appropriate legislative direction in favour of shippers within their borders. Even Manitoba's presentation, which stressed its political ideology supporting regional rate equalization, was

intended to assist its shipper constituency rather than that of the railways. The one exception to this strategic pattern was the Province of Quebec which wholly supported the Canadian railways' five-point program for policy reform which included both mutual rail access to otherwise confidential contracts and the ability to unilaterally surcharge or cancel routes. The existence of this one exception does not however jeopardize the overall validity of this hypothesis.

A variant of this hypothesis was that provincial governments would not pursue as aggressive nor as specific programs of policy formulation as shipper or rail protagonists, given the much wider representational goals of such political entities and their exposure to voter sub-group alienation.

It would appear that this variant was not corroborated by the evidence at hand, although Nova Scotia refrained from making public statements regarding its position pertaining to the national transport policy until September 1984, and Ontario, the most populous and industrialized of the ten provinces avoided formulating any recommendations to change the existing railway regulation. However, the majority of provincial governments were not hesitant to take positions in favour of specific regulatory proposals and thus participated actively in the debate surrounding transport policy. Their lack of constitutional jurisdiction and their exposure to unpopular political feedback did not lead most provinces to adopt a predictably cautious strategy.

Hypothesis VI -That those provincial governments in which the majority of shippers were locationally dependent upon only one railway would favour a more protectionist national transportation policy, since the deregulatory benefits of greater competition between two Canadian carriers would not likely apply to them. Q.E.D.

This hypothesis appears to have been confirmed from the provincial submissions examined. Both Nova Scotia and Manitoba explained publicly that they were opposed to confidential railway-shipper contracts because their shippers would be incapable locationally from benefitting from intramodal price or service competition. However, it cannot be conversely asserted that New Brunswick and Alberta were in favour of price and service competition through confidential contracts because the majority of their shippers were susceptible of competitively switching rail traffic between two rail carriers. These latter two provinces may have favoured an elimination of collective ratemaking, not because they were less protectionist than Nova Scotia or Manitoba, but rather due to their assessment that the regulatory status quo which had permitted the problem of transborder diversion described in Part I could not be permitted to continue. Indeed, both New Brunswick and Alberta were opposed to the railways' proposal that there

be a lessened regulatory onus upon route abandonments or surcharges. Moreover, the CLR remedial mechanism was attributed to Alberta having consistently expressed its concern that the majority of its shippers would remain captive to one railway and thus be deprived of the potential benefits of intramodal competition. Therefore this hypothesis has been demonstrated to be valid.

A variant to the above hypothesis was that provincial governments would predictably be more concerned in their respective policy positions over the rights of small or captive shippers located in their northern regions than the shippers close to the U.S. border, the latter having greater access both to the trucking mode and to the greater rail transport options available within the United States.

There was no consistent demonstration of concern for small or distant shippers in the provincial government strategies examined. With the possible exception of Quebec, most provinces did not distinguish between their respective shipper constituencies in terms of size, modal options or comparative distance from markets.

Lastly, the relationship between regulatory structure and pressure group behaviour was examined in this chapter in order to develop a conceptual framework within which to better understand the timing of lobbying activism. Why had the Port of Saint John waited decades before complaining publicly against port parity? Why had shippers' associations such as the CITL, CCPA and CPPA been passive regarding legislative reform throughout the 1970's and suddenly in 1984 all (including the Province of Alberta) decided to reverse their policy recommendations of a year previous in order to lobby actively in favour of confidential contracts? Although it was not the objective of this thesis to measure behavioural causality, a preliminary model was described wherein such non-economic factors as inter-group reaction to related regulatory developments were included in order to explain the timing and format of strategy formulation.

ENDNOTES

83. Motor Vehicle Transportation Act of Canada, R.S.C. 1954.

84. *An interesting exception to this consensual style of governing, which characterized the post-Trudeau years is to be found in the determination by the Mulroney government to pass the Canada/U.S. Free Trade Agreement in 1988 through the Canadian Parliament, despite serious objection from several provinces.*

85. *Submission of the Nova Scotia Department of Transportation to the Railway Transport Committee pursuant to Section 48 of the National Transportation Act, 1967, on the Effects and Implications of the*

Deregulation of the United States Rail Industry, C.T.C. File no. 50264, Halifax, September 21, 1984.

86. *In addition to lowering transborder tariffs [Chapter 4(b)], Canadian railways were sometimes contravening the Railway Act of Canada [Chapter 5 (b)] in order to retain this U.S.-competitive traffic.*
87. *Section 331 of Railway Act of Canada, see also Chapter 10(c).*
88. *Thus, the Port of Halifax had seemingly been "designated" a CN port, and the Port of Saint John, a CP Rail port, even though the latter location could be served by both railways. This erroneously-based request for legislative change by the government of Nova Scotia took on somewhat vaudevillian proportions when the federal government, always eager to accommodate a regional concern, drafted a provision entitled "Terminal Running Rights" and included it in Bill C-126. In my monograph entitled Bill C-18 and C-19 Analysis (Southam Business Publications 1987) it was noted that this provision was redundant given the existence of joint track usage within the Railway Act.*
89. *See Chapter 10 (h).*
90. *Interview with Mr. M. Beauregard, former exec. VP, Cast Container Services, in Montreal, October 1988. Also, CTC Will Not Prosecute for CN, Cast Rebates Toronto Globe and Mail, January 23, 1985.*
91. *Interview with Messrs. A. Chodos and T. Chodos, assistant to the president and president respectively, Empire Stevedoring Company, whose operations were located in Saint John, November, 1988. Rates on break-bulk traffic, and to a lesser extent on intermodal traffic, were also equalized by the Canadian railways with the rates to Montreal and Toronto from the Ports of New York and Baltimore respectively. See also, Op. Cit. #88..*
92. *Interview with Mr. D. de Belleville, general manager, Port of Halifax, December 1988 and Submission by the Halifax Board of Trade, Response to "Freedom to Move", October, 1985.*
93. *For example, in 1985 the rates between Halifax and Montreal were \$266 per 20 ft container, the identical rate between Saint John and Montreal. Similarly, the 1985 rates to Toronto and Chicago were equalized for both Halifax (\$372) and Saint John (\$904) origins. Submission of the New Brunswick Department of Transportation to the Railway Transport Committee of the Canadian Transport Commission, Inquiry File No. 50319, Deregulation of Domestic and Import/Export Rail Traffic, April 15, 1985, Halifax; also Submission by the Honourable Richard B. Hatfield, Premier of New Brunswick to the House of Commons Standing Committee on Transport, November 26, 1985, Halifax. See also Chapters 2(d) and 10(e).*
94. *Interview with Mr. R. Murray, executive director of the Saint John Port Development Commission in Saint John, New Brunswick, May 1985, and Submission of the Saint John Port Development Commission to the Railway Transport Committee of the Canadian Transport Commission re Deregulation of Domestic and Import/Export Rail Traffic, March 26, 1985, Toronto.*
95. *The interview between CTC investigators Graham and Russel, and Messieurs P. Charron, chef-service transport, ferrovaire and S. Lalonde, agent de recherche, which took place August 29, 1983 in Quebec City (the minutes were recorded in CTC file T.D. 14623.5), as well as the ensuing CTC submissions were both formally qualified by the Quebec public servants as being their "personal" views rather than the official position of their provincial government. This may have been an extension of the policy of the independentist Parti Quebecois not wishing to be seen as participating in federal endeavours.*
96. *Interviews with Mr. C. Marshall, Senior V.P. Marketing, and Ms. C. Abrams, General Counsel, Conrail at the company's offices in Philadelphia in 1987, as well as with Messrs. D. Soule, executive V.P. and R. Stender, V.P. Marketing of the New York, Susquahanna and Western Railway, which was appointed in 1987 by the trustee in bankruptcy of the Delaware and Hudson Railway, (D & H) Mr. F. DiCello, to operate the latter.*
97. *As Chart XII(b), XVII and XX demonstrates, Montreal is located in the southern part of the province of Quebec, a few miles from the U.S. border, whereas the regional lines extend from the North directly across*

into the State of Maine.

98. *Memoire sur l'incidence de la déréglementation ferroviaire aux Etats-Unis, le Ministre du Transport du Quebec (Direction du Transport ferroviaire), septembre, 1984.*
99. *This legal doctrine denotes the unlawful practice of a Court granting more than what the petitioner had requested.*
100. *Supra, Chapter 10(c).*
101. *Letter from Hon. J.S. Plohma to CTC, September, 1983.*
102. *Submission of the Government of the Province of Manitoba to the Railway Transport Committee of the Canadian Transport Commission re Impact of U.S. Deregulation on Railways and Shippers, Oct. 1, 1984. Also, interviews with Mr. D. Schaeffer, director policy, and Mr. J. Wallace, director general, Department of Transport of Manitoba in Winnipeg, January, 1988.*
103. *Some examples of prominent Canadian section 23 public interest appeals are the Quebec Newsprint Case (date of application to CTC, May 7, 1970, decision rendered March 25, 1977), the Rapeseed Case (date of application to CTC, October 14, 1970, decision rendered June 27, 1973), and the Woodpulp Parity Case (date of application to CTC, August 23, 1977, decision rendered January 20, 1982).*
104. *See Chapter 10(g) - comparison between woodpulp shippers in Calgary and Red Deer, Alberta, also, see Chapterrs 2(d), 10(e) and 11(b).*
105. *This concept of rate equalization had been supported by Manitoba and other western prairie provinces for decades in order to offset a perceived regional bias in the rail pricing of east-west vs. west-east Canadian commodity flows. For example, in 1951, the Turgeon Royal Commission had recommended an equalization of class rates and legislation was consequently enacted to implement a "bridge subsidy".*
106. *See Chapter 3 (c) and Charts XIX (a) and (b).*
107. *Statistics Canada - Estimated Labour Income divided by Gross Provincial Domestic Product (S.C. 13-213, 1979-81). This comparative data indicates that railway employment income in Manitoba constituted approximately three times the Canadian provincial average. Also, Submission of the Province of Manitoba to the House of Commons Standing Committee on Transport re: "Freedom to Move", Winnipeg, Nov. 21, 1985, presented by the Honourable John Plohma, Minister, Highways and Transportation.*
108. *A telephone survey was conducted in 1988 with approximately twenty non-grain companies which were designated by the Manitoba Department of Transport as having historically been rail users. However, only four companies of the list provided (Costa Cartage, Red River Brick, Saan Department Stores and Spruce Lumber) were identified as still using the railway system; the rest had transferred the entirety of their transport requirements to the trucking mode.*
109. *Examples of such provisions would be extended interswitching, joint running rights and competitive joint line rates (see Chapter 15).*
110. *Supra, introduction to Chapter 11.*
111. *Companies interviewed by Alberta Economic Development which had in 1983 not supported rate confidentiality, but reversed their position in 1984 were Dow Chemicals, Novacor Chemicals, Pan Canadian Petroleum, St. Regis Pulp and Paper and Sherritt-Gordon Mines.*
112. *Supra, Chapter 10 (g).*
113. *The term "reparations" in the context of the Alberta submission meant changing the legislative wording of the public interest appeal (Sec. 23 NTA) to allow for retroactive reimbursement of freight rate overpayments*

from the date of the filing of the application, as opposed to the date of the CTC decision. Op. Cit. #103.

114. *Submission of the Government of Alberta to the CTC, re: Public Inquiry into the Effects of U.S. Rail Regulation on Canadian railways and Shippers, October 3, 1984.*

115. *Section 60(d) of National Transportation Act, 1987. See Chapter 14.*

116. *The interswitching limits were subsequently extended to 30km by Section 152 of the National Transportation Act, 1987, S.C. 1987, S. 34 and Railway Interswitching Regulations, SOR/88-41, Canada Gazette, Part II, Vol. 122, No. 1, p. 275. Op. Cit #2.*

117. *This legislative mechanism subsequently became Section 136 et seq. of the National Transportation Act 1987. Infra, Chapter 15.*

118. *It is therefore perhaps not a coincidence that of the diagrammatic illustrations to explain CLR's which were shown at a number of public presentations made by the Office of Regulatory Reform of Transport Canada from 1985-88, the majority of captive origins or destinations depicted were situated in Alberta. Also, Submission of Government of Alberta Concerning Proposed Changes to the National Transportation Act, Oct. 1985.*

119. *Survey of Rail Users' Views, E.M. Ludwick & Associates, Inc., on behalf of Consumer and Corporate Affairs Canada, Winnipeg, Manitoba, September 1984. Of the possible errors in the E.M. Ludwick & Associates' methodology, two of the most notable involve the fact that Statistics Canada Railway Operating Statistics (52-003, December 1982) reported total rail freight revenues of Canadian railways for 1982 at \$4.8 billion. Was it plausible for 11% of the "randomly selected" rail customers of CP and CN in the E.M. Ludwick sample to have accounted for 3.284 billion? Secondly, how could the survey have accurately stated that 55% of the total rail expenditures of the respondents were captive to either CN or CP Rail and concurrently conclude that only 16% were subject to intramodal competition. The E.M. Ludwick & Associates report did not appear to understand that inter-switching would make any shipper within a four-mile limit of their facility susceptible of having their company's goods moved by either railway.*

120. *Letter to the Secretary of the Railway Transport Committee, C.T.C by Mr. F.E. Gooch, Director, U.S. Transboundary Division, Department of External Affairs, Canada, dated June 15, 1984.*

CHAPTER 12:

CANADIAN RAILWAYS - ANALYSIS OF STRATEGY SELECTION AND POLICY RECOMMENDATIONS

Introduction

Thus far in the thesis, the hypothesis that U.S. deregulation would likely cause a significant problem due to the attrition of trade and traffic revenues in Canada resulting from bi-national policy divergence was demonstrated to have been accurate. Three pressure group constituencies were examined in order to assess their respective strategy selection and policy recommendations pertaining to how best to resolve the problem as outlined in the examination of Hypothesis I. The analysis of the first pressure group, i.e. individual shippers, revealed that this constituency did not favour new Canadian legislative measures similar to U.S. deregulation, even though Hypothesis II had formulated that this would logically occur due to the expectation of lower freight rates resulting from intramodal rail competition. Hypothesis III qualified the above findings in that it was verified that larger and competitively located shippers were more likely to favour modification to Canadian transport policy similar to U.S. deregulation due to anticipated discounts.

The second classification of pressure group to be examined was that of industry associations. It was discovered, contrary to the formulation of Hypothesis IV, that shippers' associations did not work together as expected in order to present the government with a co-ordinated policy agenda.

The third pressure group to be examined in the context of its strategic behaviour and policy recommendations to resolve the problem as demonstrated in Hypothesis I, were the provincial governments. It was shown that this constituency would predictably opt in favour of their shippers' policy requirements rather than those of the railways (Hypothesis V). Thus, the prior assessment of the shippers' individual and collective remedial recommendations as examined in Chapters 8, 9 and 10 respectively

served as a pre-requisite for the analysis of the hypotheses pertaining to provincial governments in Chapter 11. Similar to the structure of Hypothesis III wherein it was ascertained that shippers would exhibit differing strategic positions based upon their profile, Hypothesis VI tested and found that provincial governments whose shippers were mostly rail captive would tend to oppose deregulatory legislative amendments.

The fourth and final pressure group to be examined with regard to their respective strategy selection is that of the Canadian railways.

In Part I of this thesis, it has been described how the two Canadian railways had initially alerted the federal government to the problem of transborder traffic diversion which they both attributed to the differences in regulatory treatment of the North American transport industry as between Staggers and the then applicable Canadian railway laws. The joint five-point list of railway recommendations presented to the Transport Minister in 1983, which included the request to be permitted to unilaterally surcharge or cancel routings and to engage in confidential contracts on international traffic only, the contracts of one railway, however, being mutually accessible to the other, have also been discussed, in the context of the reaction by various pressure group members (see Chapters 10(g) and 11(c)).

In June 1986, the Canadian Parliament gave first reading to Bill C-126, which constituted the legislative draft ¹²¹ of the federal government's proposed solution to the problem of transborder freight diversion and to the negative economic impact which U.S. deregulation was having upon the Canadian transport industry. This Bill, which constituted the preliminary framework of what would become Canada's new national transportation policy, did not include any of the railways' recommendations and by contrast featured several interventionist mechanisms to which Canadian National and CP Rail were adamantly opposed.

Rather than reiterate and analyze the 1983 railway proposals, it was deemed of greater pertinence to test the strategy which both Canadian railways pursued *after* Bill C-126 was given first reading in the House of Commons, in their attempts to persuade Parliament to modify what they perceived to be a government policy initiative which would lead to their economic peril. Therefore, since the 1983 railway proposals constituted the standard against which other pressure groups reacted, as has already been discussed in previous chapters, it was intended that this chapter explore certain new railway strategies which were chosen in 1986-87.

The process of determination of an effective strategy by the senior management of Canada's two

transcontinental railways to dissuade the government, at such a late stage, from pursuing this policy agenda, was beset with the following difficulties. Firstly, as it was the railways themselves which had demonstrated to Transport Canada in 1982-83 a joint commercial loss of over \$100 million attributed to U.S. deregulation and since they had requested that Canada's legislation be substantially modified in order to rectify this ever-increasing problem of revenue attrition, they would thus be ill-placed to subsequently take the position that the previous regulatory status quo was acceptable, in lieu of Bill C-126. Secondly, the specific five-point policy program for which CN and CP Rail had lobbied since 1982 had been unequivocally rejected by the federal Transport Minister, as evidenced by the legislative draft Bill which gave every appearance of equating the objectives of Canadian shippers with a new definition of public interest. It would therefore have been unlikely that the Canadian government, with their so recently exposed pro-industry political bias, would be amenable to a different set of railway-sponsored recommendations which would encourage such concepts as collective rate-making or railway plant rationalization freedoms.

As the railways were thus constrained from opposing Bill C-126 by defending the status quo and from proposing a new set of policy alternatives, they may have considered the adoption of the more onerous strategy of adversely reacting to specific provisions of the draft legislation in the hope that the government would, of its own accord, reassess and then modify its proposed regulatory agenda.

The demise of the Canadian railways' traditional role in policy leadership created an opportunity for assessment of how a pressure group would respond in a "losing" situation regarding regulatory suasion. The following hypotheses were tested:

Hypothesis VII -That the government-owned railway, Canadian National, due to its being a crown corporation and subject to government directional authority, would not publicly oppose the draft legislation as aggressively as its privately-owned counterpart Canadian Pacific.

Would the CN's senior management attempt to publicly discredit the legislative proposals of the Transport Minister, whose department was ultimately responsible for the company's own funding and long-term operational supervision? The logic employed in formulating the above hypothesis was to predict that CN's senior management would not select such a strategy due to the Canadian government being capable of controlling their budget. Alternatively, would the CN criticize the draft legislation only indirectly by supporting the strategic initiatives of CP Rail, whose private ownership permitted greater independence?

Hypothesis VIII -That their initial strategy for legislative reform having failed, the Canadian railways would then attempt to compromise their previous policy position so that only the most negative elements of the Bill (from their perspective) might be modified during the final Parliamentary hearings.

Would the Canadian railways pinpoint one or two elements of Bill C-126 which they perceived to have the most prejudicial impact upon their future business plans and concentrate their lobbying efforts primarily toward modifying these draft proposals? In order to enhance the railways' credibility, this selectivity would necessarily involve accepting several other facets of the Bill which were deemed to have a marginally lower detrimental impact. The logic in support of this hypothesis was based upon the railway strategists realizing that, given Bill C-126's strident pro-shipper orientation, it would not be reasonable to assume that the Canadian government would modify but a few of its draft legislative proposals. Alternately, would railway management adopt a scattered oppositional approach to the many negative features contained within the proposed legislation?

A variant of the above hypothesis is that the rejection of their policy recommendations as manifested by the government's draft legislation would cause the Canadian railways to re-assess their industry image and encourage them to focus upon the changes which had occurred in industry leadership and the "winning" positions of the other pressure groups.

As duopolists in a regulated industry, it had not been as necessary to respond to the views of customers as it had, for the Canadian railways to focus upon the policy orientation of the regulatory agency. For several decades the railways had acted as sole industry spokesmen until the sudden polarization of opinion which transpired in 1982-87 during the debate regarding legislative reform. Would the apparent demise of industry leadership as manifested by Bill C-126 result in an internal re-evaluation by the railways of their customary non-prioritization of shipper objectives? Would this process be reflected in the railways' strategy re-formulation in 1986-87, or would it be achievable only in the longer term?

i) CANADIAN PACIFIC RAILWAY

Of the two railways, the privately-owned enterprise, Canadian Pacific Railway (herein referred as CP Rail) had been the driving force in documenting the revenue attrition attributed to Staggers and lobbying the previous Minister of Transport in 1982-83 to put into motion the public inquiries of the Canadian Transport Commission which evaluated the impact of U.S. deregulation upon the Canadian

transport industry. It was therefore reasonable to expect that CP Rail would once again take the lead in representing the Canadian railways' position in the ensuing legislative debate, particularly since they were not constrained by government ownership as was Canadian National Railway.

a) ISSUE OF NON-RECIPROCITY WITH U.S. LEGISLATION

CP Rail's chairman, Mr. I.B. Scott, expressed what was to become one of the company's major strategies in opposition to the pro-competitive provisions of Bill C-126: the issue of non-reciprocity with U.S. legislation.

*"Particularly disturbing is that competitive line rates could be used to require Canadian railways to yield the line haul of traffic to United States rail carriers. In effect United States railroads could access Canadian traffic with impunity because Canadian railways are not extended similar privileges to traffic in the United States. The arrangement is wholly one-sided in favour of the American roads and has the potential to drain both revenues and railway jobs from Canada."*¹²²

Mr. Scott was referring specifically to the provision in the draft legislation pertaining to competitive joint line rates (herein referred to as CLR's)¹²³ which allowed a Canadian shipper to shorthaul its local railway in favour of a U.S. carrier, by requiring that the first carrier not receive more than the per ton-mile rate which would be charged by the second carrier.

In a more general sense, opposing Bill C-126 on the grounds that many of its provisions were not found in the Staggers Act strikes at the very essence of the Canadian government's proposed solution to the problem of transborder diversion which was examined in Part I. CP Rail's implied argument was that since such revenue attrition had occurred because of the disharmony between existing Canadian rail regulation and U.S. deregulation, the inclusion within Bill C-126 of mechanisms which were not found in Staggers (such as competitive joint line rates, final offer arbitration, and public interest equity appeals) were entirely inappropriate as they would create a new regulatory imbalance between the two countries.

CP Rail's strategy of criticizing the draft Canadian legislation based upon the non-reciprocity of its provisions (this argument was frequently referred to by railway spokesmen as the lack of "a level playing field") would have logically presupposed that the company was in favour of a Canadian transport law which would be very similar to Staggers. However this theoretical support for a uniform bi-national transport policy for the North American continent was inconsistent with the program of recommendations which

the railway company had actually proposed to the Transport Minister since 1982, which had favoured a continuation of collective ratemaking on Canadian domestic freight movements. Moreover, the following statement from CP Rail's executive vice-president in 1986 indicated a further confirmation of its unwillingness to support the concept of a continental transport policy harmonization, as the company did not wish to enter into competition with certain U.S. rail carriers such as Burlington Northern due to their lower cost bases.

"In many cases, the connecting carrier is a U.S. road. Because of a combination of lower-cost business, regulatory and tax environments, higher traffic densities and lower equipment and other costs, the U.S. carriers will often be able to capture the business.

This is so both for transborder traffic and Canadian origin and destination movements.

Since no reciprocal arrangements exist between Canada and the United States, Canadian carriers have no similar chance to win traffic away from U.S. roads.

*We calculate that CP Rail, alone, will be exposing \$700 million in railway services to capture by U.S. rail carriers."*¹²⁴

C.P. Rail's "level playing field" strategy, in addition to being in striking contrast to their previous policy recommendations favouring collective ratemaking, as well as their concurrent assessment of their supposed inability to compete with certain U.S. rail carriers, was further jeopardized by the following logical inconsistencies:

1. The allegation to the effect that competitive joint line rate provisions would give U.S. railways unfair access to Canadian traffic ignored the fact that CLR's were specifically not permitted for domestic Canadian movements, but only for transborder movements.¹²⁵ In other words, a U.S. railway or U.S. trucking firm would have necessarily been involved in transporting the merchandise from a U.S. origin or to a U.S. destination in order for the proposed Canadian legislative provision to be operative, and the CLR served only to shift the routings selected.
2. Not only were Canadian jobs not being lost as CP Rail had alleged, but there was also every likelihood that the U.S. railway which would be the beneficiary of the CLR longhaul would be a subsidiary of one of the Canadian railways, such as the Soo Line or the Grand Trunk Railway.¹²⁶
3. CP Rail's advocacy of continent-wide transport reciprocity would in all probability have also been tempered by its unwillingness to accept the very stringent U.S. anti-trust laws to which U.S. railways were subject, or to simultaneously extend to U.S. carriers the benefits of Canadian

subsidization of export grain or Atlantic regional freight movements.¹²⁷

4. The above-quoted prediction by Mr. Ritchie of a \$700 million loss due to non-reciprocity seemingly disregarded the inclusion in the Canadian legislative draft of confidential contracts, which were intended to resolve one of CP Rail's major complaints regarding revenue attrition due to transborder diversion, as well as the Bill's overall objective of enhancing the efficiency and competitiveness of Canada's rail transport industry, which was also likely to counter-balance any such financial losses.

b) ASSESSMENT OF NEGATIVE FINANCIAL IMPACT DUE TO BILL'S PROVISIONS

The forecasts of economic instability and resultant threat of plant disinvestment on the part of CP Rail were not given serious consideration by Transport Canada officials, partially due to independent research which suggested that U.S. railways may have saved as much as \$20 billion in cost reductions annually and increased their modal intercity freight market share due to the more competitive environment engendered by the Staggers legislation.¹²⁸ Although this research could have been disputed by CP Rail on the grounds that such savings, if they did indeed exist, would have been mostly attributed to massive U.S. railway employee layoffs and blanket routing cancellations, neither development being acceptable to the Canadian public, the company's espousal of the "level-playing field" strategy prescribed them from formulating arguments which highlighted the different cultural and political environments of the two countries.

By thus focusing upon the issue of legislative non-reciprocity rather than demonstrating the many contradictions among individual shippers and industry associations, whose varied policy recommendations the draft Canadian Bill was supposedly intended to co-ordinate, CP Rail permitted the federal government to justify the Bill's legislative objectives by merely disproving the company's estimated financial losses.

Therefore, three independent consulting firms were hired by Transport Canada to assess the potential negative impact of the Bill on the Canadian railways and all concluded that CP Rail's predictions of imminent economic demise (e.g., \$700 million loss) were greatly exaggerated. For example, in its report entitled "An Analysis of the Revenue Impact Upon the Canadian Railways of the Competitive Access Provisions of Bill C-18" by Travacon Research Limited on February, 1987, the conclusions were as follows:

"Nonetheless, the existence of competition from the United States carriers would also be responsible for rate reductions on retained traffic, so that the total loss of contribution, after tax, arising from United States carrier competition, is estimated to be \$20 million for CP Rail and \$12 million for Canadian National."

Similarly, in the report entitled "Impact Analysis of Competitive Line Rate Provisions - An Update" by the Trade and Transportation Group on January, 1987, it was stated:

"These changes were evaluated and, on balance, it was determined that the net revenue loss estimate of \$100 million for CN and CP previously documented in the 1986 CLR Report not be changed."

Lastly, in the report entitled "U.S. and Canadian Railway Industry Economic and Regulatory Frameworks: Implications for Railway Productivity and Competitiveness" by Peat, Marwick on February 1987, the determination was as follows:

"Taking all factors into consideration, Canadian railway revenue losses identified in this study are expected to be in the range of 1 to 3 percent of the railways' total revenues (\$5.6 billion). Expressed in terms of transborder traffic revenues these losses are expected to be in the range of 5 to 15 percent."

A further example of the inappropriateness of having adopted the "level playing field" strategy, which denoted a willingness to compete in a U.S.-type deregulated environment, may be found in CP Rail's assessment of the opportunity of gaining market share from the trucking mode, by virtue of the draft Canadian legislation.

The Canadian Trucking Association had opposed Bill C-126 on the grounds that confidential freight contracts, which were not permitted for motor carriers, would give Canadian railways an undue advantage in concealing their pricing decisions from a competing mode. Despite this apparent statutory advantage, as well as the above-cited indications of U.S. railways having regained some market share from the trucking mode since the enactment of Staggers,¹²⁹ CP Rail reverted to the following demonstration of the regulation mentality typical of an oligopolistic supplier within a mature industry serving essentially captive markets:

"CP Rail's rates are already fully responsive to truck competition. If additional traffic could have been profitably captured by reducing rates, CP Rail would have done so. Apart from this self-evident fact, there are other reasons why the railways are unlikely to increase their

market share at the expense of highway carriers." ¹³⁰

Although the draftsmanship of the above appears decidedly counter-productive in its unnecessary tone of superiority and self-sufficiency, it may nonetheless have been instructive in depicting one of the attitudinal reasons for the Canadian railways having relinquished such a substantial share of their customers to the trucking mode over the previous two decades, i.e. their disinterest in preserving or expanding markets through pro-competitive strategies. The fact that CP Rail had earned profits every year since its creation and had concurrently suffered a continuous slide in modally-sensitive traffic due to the development, after the Second World War of the jet-prop aircraft, the construction of the Trans Canada Pipeline, the St. Lawrence Seaway and of the Trans-Canada Highway, respectively, ¹³¹ may have in part been explained by the company's ability to increase rates on those remaining commodities which were required to use the rail mode due to their bulk physical properties and/or substantial distance from markets.

That the Canadian railways were neither obliged nor accustomed to pricing their services in accordance with normal competitive restraints of demand elasticity may be exemplified by CP Rail's having increased their lumber freight rates by 28% from 1979 to 1982, whereas Canadian lumber prices fell by approximately the same percentage due to a severe recession in North American housing starts during the same period. ¹³² The railway's insensitivity to the marketplace and their ability to cross-subsidize a decrease in modally-competitive revenues by augmenting rates on captive traffic were further evidenced by the testimony of a chemical multinational's Canadian traffic manager whose company's diverse movements of explosives, fertilizer, sulphur and paints had enabled this individual to monitor the following corporate logistical flow pattern:

"... When we look at freight rates, particularly in terms of cost per tonne mile, we find that in movements of identical products over comparable distances in the U.S. and Canada, the Canadian ones are often up to 35% higher than the equivalent movements in the U.S. They range normally in a bracket between 15% and 35% higher than equivalent movements in the U.S. ...

We have a wide variety of movements within Canada of the same product. And again, comparing moves where it is competitive with CN and CP versus those where we are captive - and 87% of our tonnage originates from a destination serviced by only one railroad - on those captive areas where we are a captive shipper, the rates tend to be up to 25% higher

than the rates on comparable competitive moves. Now, if that is not abuse of the monopoly position that the railway finds itself in, I do not know what is." ¹³³

Therefore, CP Rail's traditional pricing practises having exhibited such a high degree of market insensitivity and their customary apathy toward preserving or expanding their traffic base, made the company particularly ill-suited to pursuing, as it attempted in 1986-87, a lobbying strategy of reciprocity with the more dynamic and pro-competitive U.S. railway industry.

c) FREE-TRADE POSTPONEMENT STRATEGY

Another strategy formulated by CP Rail management was to the effect that the Canadian legislators should postpone their consideration of Bill C-126 so that it could be effectively incorporated into the Canada/U.S. Free Trade Agreement negotiations, which were being pursued in 1986. Although this option may have been viewed essentially as a delaying tactic by the railway strategists, given the comparative uncertainty at that stage of such an all-encompassing international treatise ever receiving consent from both governments, it had the further advantage from CP Rail's perspective of relieving the Canadian Transport Minister of his exclusive authority in this matter and of compelling him to justify to other Cabinet colleagues involved in the larger Free Trade discussions, why the proposed transport regulations were so unfavorably inclined to the economic interests of the Canadian railways.

The weaknesses of such a strategy appear to have been at both policy-related as well as political levels. Firstly, the stated objectives of the Free Trade Agreement were to initially remove all customs and excise charges from those dutiable commodities which were involved in Canada/U.S. commercial transactions. By contrast, the in-depth harmonization of transborder service regulation (such as have been proposed for the EEC in 1992) be it transport, communications or banking policy, was not intended to occur until a much later time-frame. Secondly, it could have been anticipated that the Transport Minister would protect the authority of his portfolio and not willingly cede his recent legislative initiative to a future collegial decision-making process of Cabinet. It is perhaps for this reason that CP Rail attempted to lobby a wider group of Ministers of the Crown, such as the President of Treasury Board and the Minister of Regional Industrial Expansion, since the railway sensed that their "Free Trade" strategy would not be given much support within the Department of Transport.

d) THE NATIONALISM STRATEGY

A third strategy which CP Rail attempted to employ to their advantage was to impugn the Bill, which allowed U.S. railways or their Canadian rail subdivisions greater access to previously CN or CP Rail captive locations, as being contrary to Canadian nationalistic interests.¹³⁴ This evoked a genuine concern that the proposed Canadian legislative solution would benefit U.S. carriers, such as the Burlington Northern Railway,¹³⁵ to a far greater degree than it would ultimately assist Canadian objectives. As a consequence of the effectiveness of this strategy, a number of shippers' associations focused their own Parliamentary submissions on countering the CP Rail argument, by demonstrating that the users of rail transportation were as concerned about Canadian sovereignty and expanded Canadian job opportunities as the suppliers.

CP Rail's "nationalism" strategy predictably triggered a spate of anti-U.S. speeches in the House of Commons by M.P.'s from both opposition parties, who were perhaps less informed about the details of the Bill or of the North American transport industry than they should have been. For example, Mrs. Sheila Finestone, the Liberal party Member of Parliament for Mount Royal, Quebec predicted that the proposed transport legislation would be "like letting Attila the Hun and Genghis Khan loose" in Canada.

... deeply concerned about allowing Americans to enter Canada with whatever means of transportation. They are not subject as we are to statutes and regulations. So they can come here and sign contracts. They are not in the a competitive situation.

*In my view, Mr. Speaker, when you have confidential contracts, you have increased competition and no control over the Americans who enter this country to buy out our property, or to take over our routes.*¹³⁶

e) LACK OF RESPONSIVENESS TO SHIPPERS' ARGUMENTS

Perhaps the most serious flaw in the lobbying approach which CP Rail management adopted in order to defeat or neutralize Bill C-126 was the lack of attention given to the comments and strategies being pursued by those pressure groups which were the proponents of the legislation, as well as its prime beneficiaries. Whereas the shippers' association executives regarded the railways' Parliamentary submissions and public pronouncements as information which necessitated detailed analysis and careful response, CP Rail never acknowledged that the industry's views warranted any rebuttal. Although this

somewhat superior attitude is perhaps a reflection of the dominant role which Canadian railways during previous decades had been able to exercise in setting freight rates, interacting with their primarily captive customers, and in serving as spokesmen for the entire transport industry,¹³⁷ the fact that Bill C-126 was so patently biased in favour of the interests of shippers should have alerted CP Rail management that their leadership role in transport policy formulation was in jeopardy and that their public policy strategy needed to be immediately revamped. Despite the visible defeat of those 5-point legislative recommendations which the company since 1983 had been proposing to the federal government so as to solve the problem of transborder traffic diversion, CP Rail proved unwilling or unable to change its customary leadership profile and "dominant force" self-identity and thus did not acknowledge that extraordinary measures were immediately required to salvage a Canadian legislative enactment which contained a multitude of new regulatory mechanisms which denied the company's proposed policy objectives. This seeming inability to react in a timely manner to such adverse policy developments may be a function of the period of time required for a mature industry leader to change its corporate self-image.

f) CANADIAN SENATE HEARINGS

After the Bill had been approved without any significant modification by the Lower House in 1987, CP Rail came to the realization that its above-described strategies of non-reciprocity, Free Trade postponement and nationalism had proven inadequate. The company then modified its policy position quite dramatically before the Canadian Senate public hearings, by stating that it was now in favour of many of the mechanisms which it had spent the previous five years actively disputing.

*"CP Rail itself proposed several of the fundamental changes incorporated in Bill C-18: confidential contracts, expanded interswitching, and rate arbitration. And certainly, we have no objection to many other measures in the Bill such as the abolition of collective rate-making, an expedited public interest investigation process, and payment of reparations. Without exception these are strongly pro-competitive measures and, properly applied, can yield benefits for the industry and its shippers."*¹³⁸

CP Rail, however, proceeded to qualify its sudden support of the legislative draft by requesting the Senate not to approve the competitive joint line rate provisions.¹³⁹ This seemingly desperate turnabout by the company's strategists was perhaps based upon the assumption that the Upper House, whose majority were of a different political affiliation to that of the Lower House, would not have the

resources nor the interest to uncover the striking inconsistency between CP Rail's current and former policy positions. However, the railway may have, once again, underestimated the impact of industry pressure groups upon the legislative process, as these shipper associations were determined to influence the Senate in order to finalize what they perceived to be an unprecedented national transport policy re-orientation in their favour.

Lastly, the credibility of CP Rail's lobbying strategy was further undermined by contradictory public policy direction having been pursued by other subsidiaries of the parent corporation. For example, one of the arguments formulated by the railway to justify its opposition to competitive joint line rates was as follows:

*"The compensation formula gives no recognition to the fact that the carrier that initially put in the line and provided the capacity to serve the shipper will not be compensated for these investments. Instead, the accessing carrier will be able to secure the traffic at a much lower cost since it will not be burdened by the expense of carrying the investments that generated the traffic in the first place."*¹⁴⁰

This, however, was the very reverse of the strategic substantiation used a year previous by CP/CN Telecommunications in their regulatory application to be granted authority to use the existing long distance telephone infrastructure so as to compete with the network owner, Bell Canada.

ii) CANADIAN NATIONAL RAILWAY

The senior management of the Canadian National Railway (herein referred to as CN) experienced some considerable difficulty in formulating an effective and independent corporate strategy opposing Bill C-126 in that the Transport Minister who proposed the legislation was the same individual who could terminate their careers with the Crown Corporation.¹⁴¹ It is perhaps for this reason of limiting its profile that the company initially had accepted to follow the leadership of CP Rail in its 1982-83 5-point policy recommendations to correct the problem of transborder diversion and subsequently had refrained from publicly criticizing what it perceived to be a negatively-impacting policy initiative on the part of the Minister.¹⁴²

Due, in part, to the heightened legal sensitivity to the practice of collective ratemaking by the two Canadian railways which had been opposed by several shipper pressure groups during the CTC hearings, there had also occurred a distancing, from 1985, between CN and CP Rail with regard to their joint

transport policy planning efforts. This resulted in an uncoordinated and sometimes conflicting Canadian railway response to the Bill, which jeopardized the potential effectiveness of the dissenting strategies selected. An example of the counter-productive remarks which may have served to further divide these oligopolistic carriers, whose interests in limiting competition and whose strategic objectives with regard to opposing the proposed legislation were almost identical, may be found in the following CP Rail statement.

"Government ownership reduces the incentive for CN Rail to conduct its activities with the commercial discipline that exposure to bankruptcy imposes." ¹⁴³

a) CAPTIVE SHIPPER TESTIMONY

When CN decided in 1986-87, faced with an unpalatable legislative draft, to pursue an autonomous strategy, the company's lack of experience in independently participating in public policy suasion caused them to commit certain glaring logical inconsistencies which defeated not only their own credibility, but that of the Canadian railway position as a whole. Consider that Mr. W.J. Morin, CN's Senior Vice President, Marketing, testified before the Canadian Senate to the effect that the competitive access provisions of the draft legislation were in need of revision so as to entitle only those shippers who were captive to one railway to the recourses envisaged.

"The purpose of competitive access should be to protect shippers whose traffic is truly captive. But to allow all shippers to use the mechanism, regardless of whether they indeed have access to an effective competing transportation service, would introduce regulatory intervention into an area in which the forces of the marketplace are powerful enough to guarantee fairness." ¹⁴⁴

Yet, both Mr. Morin and Mr. Lawless, the CEO of CN, had stated categorically in previous testimony before the Standing Committee of the Lower House that captive shippers did not exist in Canada.

Mr. Gordon Taylor (Member of Parliament for Bow Valley, Alberta):

Thank you very much, Mr. Chairman.

I have five questions, most of which are just simply to get information. The first one is on the captive line. I enjoyed your slides showing what were not two captive lines. You did not then give us an example of what you considered a captive line. Could you do that?

Mr. Lawless: We cannot find one.

Mr. Morin: I do not believe there is such a thing as a captive shipper¹⁴⁵

b) STRATEGIC INCONSISTENCIES

Similarly, at the Senate hearings, CN criticized the Bill for the non-reciprocity of certain provisions.

"Of even greater concern with regard to competitive access provisions is their application to transborder traffic. Our American competitors would thus gain an additional advantage over Canadian railways in that similar access to their facilities and traffic is not available to us in U.S. territory."¹⁴⁶

Yet, a few months earlier, before the House of Commons Standing Committee, Mr. R. Lawless, CN's CEO, stated that reciprocity would not constitute an effective legislative solution:

Mr. Joe Reid (Member of Parliament for St. Catherine's, Ontario): Would you tell me, in the interest of peace and harmony on both sides of the river, and establishing a reciprocal arrangement, would it be preferable for us to lobby an opportunity for Canadian lines operating in the States to have the same right as given in Bill C-18, or are you asking, or would you ask, us to do something to say that Bill C-18 only applies to Canadian railways?

Mr. Lawless: My answer to that, and I will ask Mr. Morin to comment too, is I tried to indicate to you what we are talking about is the elephant and the mouse here.

Mr. Reid: We cannot change that.

Mr. Lawless: It is about 80:20. About 80% of the traffic goes south and 20% comes north, and what we would be arranging would be a reciprocal arrangement that would see substantial access to Canadian traffic going south; the same access but very limited volume available in the other direction. I really believe that although reciprocal arrangements sound great from a standpoint of fairness, when you look at the business that is available, it would be grossly and totally unfair.¹⁴⁷

These logical inconsistencies, which had the effect of equally undermining those components of the CP Rail strategy which focused upon similar issues [such as shipper captivity and non-reciprocity (section {i}{a})] appear to have been a function in part of the lack of awareness by CN management that lobbying Parliament at such a late stage of legislative development required more rigorous preparation,

and in part of their traditional, though ill-placed sense of confidence that the government would inevitably heed the views of the Canadian railways.¹⁴⁸

c) STRATEGY PRESCRIBING U.S. RAILWAY USAGE OF THE ACT

Rather than support the CP Rail recommendation to the effect that the Bill should be postponed and subsequently amalgamated into the Canada/U.S. Free Trade Agreement negotiations, CN's strategy was to request that the draft transport legislation be modified so as not to enable U.S. railways to use the pro-competitive provisions.

*Mr. Morin: "In fact toward the latter stages of the debate with the standing (House of Commons) committee we made some recommendations as to changes. We recognized that U.S. railways in Canada already have access to the four-mile interswitching limit. We did not propose that it be taken away from them, but we did recommend that if the interswitching limits are to be extended, the extension should not apply to U.S. railways nor should any other competitive access measure."*¹⁴⁹

This would have meant that U.S. railways whose trackage were located outside the Canadian border, but also within the 750 miles statutory zone surrounding a Canadian captive shipper, could not participate in the competitive line rate mechanism (Chapter 15) as envisaged by the Bill. Also railways such as Conrail and the Burlington Northern, whose trackage extended within Canada would equally be prescribed from benefitting from the extended interswitching provisions.¹⁵⁰

The objections which could have been anticipated and some of which were in fact raised by shipper pressure groups against such a strategy were three-fold:

- 1) To subject the Canadian subsidiaries of U.S.-owned railways, the former having longstanding and bona fide Parliamentary charters to operate within Canada, to a more onerous regime of legislation, was both discriminatory policy and potentially unlawful.
- 2) As there was no precedent in U.S. transport legislation of U.S. subsidiaries of Canadian railways, such as the Grand Trunk or the Soo Line, being treated any differently than other U.S. lines, the risk of some retaliatory action by Congress would predictably constitute a major policy restraint.
- 3) Since one of the primary objectives of the Bill was to encourage a greater number of competitive transport options being available to shippers, it was unlikely that the Canadian government would accept any modifications to the draft legislation which would increase shipper dependency upon

their local railways.

CN further attempted to justify its position of discriminatory regulation based upon line ownership by formulating the hypothesis that the carrier which had made the investment in the infrastructure was entitled to the predictable revenues deriving from its proprietary interest:

"Shippers located on one railway's lines now have access to services as a result of investments in fixed plant and equipment. Today, rail carriers can justify such investments because traffic volumes and routings create predictable revenues.

Gaining and protecting competitive advantage through the investment of capital and other resources are standard and obvious practices to the operation of a free market business.

*For instance, at the Autoport in Halifax we have applied significant resources to secure automotive traffic. The competitive access provisions of the Bill would severely dilute the value of such an investment and would discourage future risk taking of this type."*¹⁵¹

This position may have been questioned on the dual grounds that it appeared to create modal inequity, which could not be justified by inherent competitive efficiencies of rail vs. truck, and that it would have been contrary to the regulatory principle of common carriers' obligations. Thus, a shipper whose facility was typically located contiguous to both a railway line and a highway would have had the ability, according to the above CN hypothesis, to select any number of motor carriers, as they had not invested in the right of way, other than by licenses or fuel taxes, but be concurrently restricted to the one railway company which had constructed the rail siding connecting its plant.

Therefore, in addition to being in direct opposition to the longstanding concepts of interswitching and joint track usage [see Chapter 11(a)], as well as the theme of the Bill to alleviate shippers' locational captivity, (plus the above-cited argument formulated by CP/CN Telecommunications, of which CN owned a 50% equity interest, to use the long distance telephone network of Bell Canada),¹⁵² CN's above references to "free market business" and "future risk taking" were antithetical to the railway's particular status as a common carrier whose entry and exit from markets were strictly regulated by public interest rather than investment considerations. Moreover, there appears to have been some further logical inconsistency between CN's previous argument to deprive U.S. carriers from using extended interswitching provisions¹⁵³ and the fact that those U.S. railways whose trackage extended within Canadian territory had made the same type of infrastructural investments which CN was now claiming warranted its own

"predictable revenues".

d) "FREEDOM TO MANAGE" STRATEGY

Another facet of the strategy which CN pursued was oftentimes referred by the company's senior management under the heading "freedom to manage". This term denoted the railway's being prepared to accommodate itself to the Bill's shipper-prevalent provisions, on condition that it be permitted through modified legislation to rationalize its plant by abandonment of substantial tracts of its infrastructure. Mr. Lawless, CN's CEO, informed the House of Commons Standing Committee that as much as two-thirds of the company's trackage was not producing a satisfactory level of revenue and inferred that thousands of miles of rail branch lines which served to connect both the Northern and Eastern extremities of the country with Central Canada and to the West coast should be envisaged for abandonment, if CN were to avoid the one billion dollars of loss over five years, which the company predicted would be occasioned as a direct result of the pro-competitive measures contained in the Bill.¹⁵⁴

This strategy backfired upon CN since the Transport Standing Committee included Members of Parliament, many of whose electoral ridings were located in the peripheral regions of Canada which would have been "disconnected" due to the railway's abandonment plans. These M.P.'s perhaps recognized that their own political careers could be jeopardized by such a "freedom to manage" strategy being extended legislatively to the Canadian railways and in consequence modified the Bill so as to ensure that no more than 4% of a railway's trackage could lawfully be subject to abandonment applications per annum, the procedures and criteria for which were already exceedingly stringent.

Given that both Canadian railways had unsuccessfully lobbied since 1982 for a lessened regulatory onus to abandon portions of their infrastructure, using the Staggers model for purposes of comparison, it is difficult to understand why CN would have suddenly determined in 1986-87 that this strategy had any more chance of gaining government approval.

In their arguments prescribing U.S. railways from using certain provisions of the Act, as well as the "freedom to move" recommendation, CN strategists appear not to have adequately considered the Canadian policy-makers' priorities or likely reaction, prior to formulating their company's own requests for legislative amendments.

It may therefore be a more effective practice for pressure groups to forego independently-

oriented policy assessment in favour of constructing their strategic plan from the perspective of the decision-makers' anticipated regulatory agenda.

Conclusions

In evaluating the hypotheses which were formulated at the introduction to this chapter, it appears evident that the lack of co-ordination, lobbying experience and responsiveness to the policy proposals of other pressure groups contributed significantly to the ineffectiveness of the railway strategies.

Hypothesis VII -That the government-owned railway, Canadian National, due to its being a Crown corporation and subject to government directional authority, would not publicly oppose the draft legislation as aggressively as its privately-owned counterpart Canadian Pacific.

The evidence suggests that whereas CN followed the leadership of CP Rail in alerting the Transport Minister of the problem of transborder diversion and in supporting their recommendations for remedial legislation, the Crown corporation took a much more strident and government-independent position following the release of Bill C-126 in 1986. The pro-shipper orientation of the draft legislation was perceived by the company's management to be of such an extreme and uncompromising degree that this appears to have caused CN to reverse its former practice of not actively criticizing the government's proposed policy changes. Therefore, it appears that this hypothesis was invalid.

Hypothesis VIII -That their initial strategy for legislative reform having failed, the Canadian railways would then attempt to compromise their previous policy position so that only the most negative elements of the Bill (from their perspective) might be modified during the final Parliamentary hearings.

It would appear that the above hypothesis was not confirmed by the railway submissions herein examined. Both railways steadfastly opposed the entirety of the draft legislation, without attempting to concentrate their lobbying efforts upon those elements which they perceived to be the most prejudicial. The one exception to this strategic direction was CP Rail's submission to the Canadian Senate, wherein the provisions of confidential contracts, extended interswitching and final offer arbitration were suddenly and uncharacteristically accepted so that the company's opposition to CLR's (see Chapter 12(i)(f)) would seem a reasonable compromise. This strategy was ineffective due to the lack of CP Rail's presentational consistency and credibility at such a late stage of the proceedings.

A variant to the above hypothesis was that the rejection of their policy recommendations as manifested by the government's draft legislation would cause the Canadian railways to re-assess their

industry image and encourage them to focus upon the changes which had occurred in industry leadership and the "winning" policy positions of the other pressure groups.

It has been demonstrated in previous chapters that there existed substantial inconsistency within and between the proposals submitted by industry pressure groups. The Canadian railways never responded directly to the shippers' submissions during the public inquiry process, even though this constituted one of the major reasons for the defeat of their own five-point plan which they had recommended in 1982 to be included in the remedial legislation. The fact that Bill C-126 contained none of the railways' policy objectives and was entirely pro-shipper in orientation should perhaps have awakened senior railway management to the necessity of re-evaluating their companies' industry image, customary leadership role and non-responsive attitudes with regard to other pressure groups.

The evidence examined in this chapter therefore does not confirm the above variant, in that neither railway appeared to re-assess their traditional leadership profile within the industry or "dominant force" public image. Nor did they express any greater interest, upon the release of the draft transport legislation in 1986, in focusing upon the concerns of shippers, such as the lack of intramodal rail competition, which had succeeded in influencing the new regulatory plan envisaged by Bill C-126.

CONCLUSIONS TO PART II

Whereas the purpose of Part I was to test whether there existed a sufficiently serious problem of rail industry revenue attrition, and transborder traffic diversion to warrant remedial Canadian legislation, Part II examined the dynamic process of legislative change which ensued and critically analyzed the strategy selection of the four major pressure group constituencies comprising the rail transportation industry.

In reviewing the policy proposals of these four pressure groups, a wide variance in position was evidenced by all categories except the Canadian railways. Indeed, for several shippers' associations, a complete reversal of their policy recommendations occurred from 1983 to 1984. There was found to be a significant degree of logical inconsistency as exhibited both within the presentations of individual pressure group members and between other members within the same pressure group. This generalized weakness in logical tenor of the public inquiry submissions, added to the non-consensual strategic directions being proposed by those favouring a more pro-competitive national transportation policy, resulted in the Canadian federal government being required to initiate its own preferred regulatory solution. Thus the

majority of pressure group strategies examined proved ineffective in directly influencing the government decision-makers to adopt a specific set of legislative recommendations due to internal inconsistency, extraneous commentary, intra/inter-group strategic contradiction and a lack of attention upon the issues with which the Transport Department officials were likely to be concerned.

Secondly, there was little if any structural linkage between the individual shipper, industry association and provincial government pressure groups with respect to their strategy selection. Although there was some similarity in the policy recommendations between certain individual shippers and the industry associations of which they were members (for example, Union Carbide vs. CITL), there were an equal number of similarities between non-member entities (Alcan vs. Chemical Producers) as well as dissimilarities between members and their respective associations (Indusmin vs. Board of Trade). The same equivocal relationship may be found between the strategy selection as between associations and provinces (concurrent policy reversals of CP & PA vs. Alberta) and as between shippers and the provinces in which they operated (divergent recommendations between Canterra Energy vs. Alberta).

Lastly, the evidence suggests that the industry associations may have been influenced as much by the lobbying behaviour and strategies selected by other associations, as by the economic issues of transborder diversion and intra-modal rail competition or by the opinions of their respective members. There appears to be substantial improbability that COFI, CITL, CP & PA and CCPA would all have reversed their strategies between 1983 and 1984 had it not been for the dynamics of inter-group communication.

Moreover, it could be posited that the shippers' association executives made decisions regarding policy objectives which were subsequently rationalized by the appearance of membership consultation and that the majority of individual shipper members, if their views had been solicited in an empirical manner, would not have exhibited strong opposition to a continuation of railway collective rate-making, as they were themselves accustomed to intra-industry rate negotiating and product sharing arrangements.

Thus, while exhibiting less diversity than the strategies adopted by either shipper and provincial government pressure groups, the Canadian railways failed in their mutual objective to neutralize the pro-competitive provisions of the Bill, due to a combination of not incorporating the federal government's perspective on policy reform into their legislative recommendations, not responding directly to the industry submissions and not formulating any innovative counter-proposals which would have been perceived as a creative compromise rather than a simple negation of the above two elements.

ENDNOTES

121. *Bill C-126, upon prorogation of all unfinished legislation when Canadian Parliament adjourned in 1986, was re-introduced into the House of Commons with modifications, as Bill C-18 in 1987.*
122. *CP Rail Submission to Standing Senate Committee on Transport and Communications, July 1987, p. 3. Also, this same argument was re-stated in Transcript, July 14, 1987, Issue 2 - JKJ 140787 page 93 - Sen. Davey cross-examination.*
123. *Infra, Chapter 15.*
124. *Speech by Mr. Robert Ritchie, executive V.P. for C.P. Rail, to the National Transportation Committee of the Canadian Manufacturers' Association, Toronto, Sept. 1986. Also, testimony by Mr. Ritchie to House of Commons Standing Committee, regarding the competitiveness of Burlington Northern, March 3, 1987.*
125. *Infra, Chapter 15, regarding Section 134(5) of the National Transport Act, 1987.*
126. *Supra, Chapter 2 (b); if not a subsidiary, then a U.S. railway which had a joint operating and marketing agreement with a Canadian railway.*
127. *According to Mr. C.R. Pike, vice president, CP Rail, at the 17th semi-annual meeting of the Canada Grains Council, Toronto, Oct. 28, 1986, the Western Grain Transportation Act, 1986 alleviated CP and CN from \$400 million annual losses which they claimed to have been losing due to statutory export grain rates. The Maritime Freight Rates Act and Atlantic Region Freight Assistance Act R.S.C. 1970, C.M-3 subsidized movements within and from the Atlantic provinces by 10% and 30% respectively.*
128. *Barnekov, Christopher, ICC report entitled "A Look at Two Faces of Railroad Deregulation", Traffic World, Sept. 18, 1986, Gattuso, James, the Heritage Foundation, Issue Bulletin, number 129, June 5, 1987, Washington, D.C. and Barnekov, Christopher and Kleit, A.N., "The Efficiency Effects of Railroad Deregulation in the United States", International Journal of Transport Economics, Vol XVII, February, 1990.*
129. *Ibid.*
130. *CP Rail, Submission to the House of Commons Standing Committee, 1987, page 32.*
131. *The major traffic flows which thus were shifted away from the rail mode after W.W.II were mail and passengers (aircraft), oil and liquid petroleum gas (pipeline), iron ore and grain (seaway) high-valued manufactured goods (highway).*
132. *CTC Inquiry into Impact of U.S. Deregulation, 1984, CP Rail written response to certain questions originally posed during cross-examination by counsel representing Consumer and Corporate Affairs Canada, 1984.*
133. *Testimony of Mr. S. Cash, logistics manager, C.I.L., before House of Commons Standing Committee, Ottawa, 1986 (Transcript 14:45).*
134. *A similar railway strategy had been used with some success by CP Rail, in the company's lobbying efforts during 1980-83 against the extraterritorial reach of the U.S. anti-trust laws [see Chapter 4(c)] in order to maintain collective rate-making in Canada.*
135. *From 1982-87, the BN did not participate at all in the CTC or Parliamentary hearings as they feared that this would have given additional credence to their vested interest in the proposed competitive legislative provisions. Interview with Mr. G. Schlaeger, VP. Forest Products, BN, in Fort Worth, Texas, Oct. 1987.*
136. *Hansard, House of Commons debate, January 30, 1987.*

137. *Supra*, Chapter 8(a).
138. *Submission by Mr. I.B. Scott, Chairman and CEO of CP Rail to the Standing Senate Committee on Transport and Communications, July 14, 1987, pp. 1 and 2.*
139. *Infra*, Chapter 15.
140. *CP Rail, 1987 Submission to the House of Commons Standing Committee, p. 65.*
141. *The Governor-in-Council (i.e., federal Cabinet) appoints the chairman of CN and its board of directors. It was not uncommon for these individuals to have been active in the same political party as the government in power, as well as for some senior management to be appointed at the request of the Transport Minister's office. For example, former prime minister P.E. Trudeau's chief of staff, now Senator M. Kirby, became executive VP. at CN, while the Liberals were in power. Similarly, Mr. B. Gallery, a prominent conservative fund-raiser became chairman of CN during the Mulroney government.*
142. *In an interview with Mr. P. Schwartz, assistant VP. for CN in 1988, it was stated that an internal corporate memorandum had assessed the detrimental consequences which Bill C-126 were likely to have upon CN's future financial standing. This position paper apparently did not receive the chairman's approval to be released publicly, for political reasons.*
143. *Submission to the Standing Transport Committee of the House of Commons, CP Rail, March 1987, p. 16.*
144. *Submission by CN Rail to the Standing Senate Committee on Transport and Communications, July 14, 1987, p. 4.*
145. *Testimony before the Standing Committee on Transport of the House of Commons, March 2, 1987, Transcript, p. 12:36.*
146. *C.N. Submission to Standing Senate Committee on Transport and Communications, 1987, p. 3.*
147. *Testimony of Mr. Ronald Lawless before the House of Commons Standing Committee on Transport, 1987, Transcript 12:65 (also see Transcript 12:23).*
148. *During an interview with Mr. J. Provost, assistant VP. for CN in 1987, it was this officer's view that, even a few weeks prior to the House of Commons Standing Committee's approval of the Bill at Third Reading, that the Canadian government would eliminate those provisions of the Bill to which the railways were opposed.*
149. *Transcript of Senate Standing Committee on Transport and Communication, Tuesday, July 14, 1987, issue 2-140787, page 56.*
150. *Supra*, Chapter 2 (a), Chart V, as well as end notes #2 and #116.
151. *Standing Senate Committee on Transport and Communications, Evidence by Mr. W.H. Morin, Senior VP. Marketing, CN, page 7 and Transcript, page 12:14, March 2, 1987.*
152. *Supra*, Chapter 12 (i) (f).
153. *Standing House of Commons Committee on Transport and Communications, Transcript page 12:34.*
154. CN's Position on Bill C-18, *Submission to Standing House of Commons Committee on Transport, 1987.*

PART III:

THE CANADIAN LEGISLATIVE SOLUTION - NATIONAL TRANSPORTATION ACT, 1987

CHAPTER 13:

FINAL OFFER ARBITRATION

Introduction

This portion of the thesis will analyze certain critical elements of the new transport law which was ultimately approved by the Canadian government in December, 1987 and will assess whether these provisions effectively addressed the problem of Canada/U.S. transborder diversion described in Part I and whether they achieved a balance of the varying public policy concerns which were expressed by pressure groups described in Part II. As the National Transportation Act, 1987 contains hundreds of pages which constitute a detailed legal treatment of how the regulatory transition into a new transport policy for Canada was to be effected, it is not the objective of this Part to describe the new legislative structure in a comprehensive manner.¹ For example the new Canadian legislation permitted confidential shipper/railway transportation contracts, of which Charts XXXIII and XXXIV describe the frequent usage. Instead, three key components of the new Act were selected, i.e. final offer arbitration (herein referred to as FOA), the public interest equity appeal and the competitive joint line rate application (herein referred to as CLR), as they represent previously untried concepts in transport regulation, not only in Canada but internationally, in order to test two final hypotheses.

Although the new Act also contained provisions which attempted to guide industry behaviour toward a different set of pro-competitive expectations and freight rate negotiating patterns, such as extended interswitching, joint track usage and diminished options for rail abandonment,² the following

three statutory elements which are herein analyzed may best encapsulate the direction which the Canadian policy makers concluded was the most effective means of satisfying the problems of divergent national transport regulation within a continental economy, of encouraging competition among oligopolistic rail service suppliers and of increasing the commercial efficiencies of an industrial base characterized by a wide variance in size, commodity group and regional interest.

The objective of this chapter, as well as of the two subsequent chapters in Part III, is to test the following hypotheses:

Hypothesis IX -That the objective which the government had set in the new regulatory framework of encouraging Canadian intramodal railway competition would not be achieved due to its permissive rather than penal statutory clauses.

In the National Transportation Act, 1987, Parliament attempted to respond to the submissions of shipper and association pressure groups to modify the Canadian transport legislation so as to increase efficiencies and put downward pressure upon certain freight rates, through the prohibition of collective ratemaking and the inferential encouragement of transport price competition between CP Rail and CN. How should the legislative drafting have most effectively directed the Canadian railways to compete against one another?

Was the elimination of Section 279 of the previous Railway Act from the new legislation enough to prevent tacit patterns of rail price leader/price follower, or the "telegraphing" of freight rate decisions by one rail duopolist to the other through tariff publication or by shipper intermediaries during the course of re-negotiations? Should the new legislation have been more forceful in achieving its intramodal competitive objective by explicitly requiring pro-competitive behaviour through either the prohibition of conscious parallelism or the granting of permission to apply for subsidy or abandon unused rail infrastructure conditional upon railway demonstrating that it had taken away a % of market share from another rail carrier? This hypothesis is based upon the logical premise that duopolistic railways, which had for decades been permitted by law to act collusively and which both recognized that aggressive intramodal competition would likely diminish their respective revenues due to discounted rates and rebates, would tend not to pursue such active pro-competitive behaviour unless the law explicitly required it, with sanctions for non-performance.

Hypothesis X -That the federal government did not adequately consider the effects of market sharing practices upon Canadian shippers by previously dominant railways in that the transport users would prove unaccustomed and unwilling to publicly dispute rate decisions of

the rail carriers to which they were locationally captive.

Similar to the logic which has been applied to Hypothesis IX, shippers which had manifested a pattern of non-protagonistic behaviour during previous decades of freight rate negotiations were unlikely to change their lack of propensity to initiate regulatory appeals unless the legislation recognized this customary docility and intentionally facilitated such risk-tasking.

The FOA and equity appeal provisions of the new legislation were included in the 1987-88 regulatory solution as evidence that the policy-makers intended these mechanisms to be used, either directly or by threat of imminent application, by shippers negotiating with Canadian railways.

Hypothesis X predicts the irregularity of usage of these regulatory structures, upon the logical basis that the historically "captive" mentality and fear of railway price or service retaliation by Canadian shippers was not anticipated by the Transport Canada officials when drafting the legislation. Had this reticence to contest railway rate determinations been acknowledged, the application processes would perhaps have been drafted differently. For example, shippers would not have been required to defray the arbitrator's fees, or an automatic burden of proof would have been imposed upon the rail carrier when an application for FOA or equity appeal were initiated? Was there sufficient consideration given by the Canadian policy-makers to the impact which decades of shipper non-contestation of railway pricing and collusive rate setting practices had had upon the players being governed by the remedial regulation?

Each of the following three chapters will be divided into a description of the statutory mechanism being examined, as assessment of the strategic considerations applicable to shippers and railways, an evaluation of the actual cases of that category of appeal which have been initiated during 1988-89, and conclusions regarding the effectiveness of the regulatory structure in question, in the context of Hypotheses IX and X.

A variant of the above hypothesis is that in its legislative solution, the Canadian government ignored an essential reason for the occurrence of the problems described in Part I, which was the divergence of regulatory policies between trading nations within a continental economy.

Would the solution which was ultimately formulated by Department of Transport officials recognize that the inherent cause, as attested to by most pressure groups, of the problems described in Part I was the disharmony between bi-national regulatory schemas? Would the new Canadian legislation therefore attempt to accommodate its structure to the provisions of the U.S. Staggers Act of 1980, which was perceived to have led to transborder diversion and substantial revenue attrition?

By contrast, would the elements of the new Canadian legislation which were disharmonious with Staggers result in further disparities between Canadian and U.S. transportation industries?

a) PROCEDURE

The concept of freight rate arbitration had been proposed by certain industry and provincial pressure groups during the public inquiry stage of the Canadian Transport Commission as an informal and expeditious means of permitting individual shippers to appeal railway pricing decisions.³ As has been explained earlier, the only review mechanism which existed in the former legislation was the public interest (Section 23) appeal, whereby the contestation of a railway rate level had generally required five to seven years of litigation and involved large groupings of shippers acting jointly and severally as co-complainants due to the necessity of demonstrating a public, as opposed to a private, commercial interest and due to the imposing legal expenses to be defrayed (see end note #103).

The objective of the Canadian government in instituting this new regulatory mechanism in 1987 was to lessen a shipper's captivity to unilateral rail pricing decisions by increasing the traffic manager's bargaining power in freight rate negotiations.

Most of the industry representations which had been submitted in favour of rate arbitration had not envisaged the "final offer" methodology⁴ which prohibits the arbitrator from suggesting a compromise between the respective positions of the parties. The precise legal structure and process which were selected by the Canadian policy-makers and which presently have the force of law upon all railway, as well as domestic air cargo movements in Canada are herein described.⁵

If a shipper were dissatisfied with the rate proposed by a carrier or any of the proposed conditions associated with the movement of the freight, an application must be filed in writing to the National Transportation Agency for final offer arbitration (herein referred to as FOA). This recourse would also apply to actual published rates which were being proposed for future movements.

Fifteen days prior to the above submission, the shipper would have served a written notice on the carrier indicating the company's intention to institute FOA proceedings.

The application to the Agency need only contain three items: the final rate offer of the shipper, the last offer received from the carrier, and an undertaking by the shipper to pay 50% of the arbitrator's fee.

During final offer arbitrations which were instituted in 1989, objections were raised by railway

barristers to the effect that the term "shipper" did not include a consignee of an F.O.B. destination movement ⁶ and that in addition to the three items, a fifteen day pre-notification was invalid if it did not contain a full description of the goods and routings which were being designated as subject to the arbitration. ⁷

The carrier-defendant may modify the last offer which has been described as that of their company in the shipper's submission, within ten days. The carrier may also require that the shipper agree in writing to ship the goods to which the arbitration relates in accordance with the future decision of the arbitrator.

The Agency may refuse to submit the case to arbitration if it is of the opinion that the matter raises issues of general public interest and that interests other than those of the individual shipper and carrier may be materially prejudiced by the matter submitted. Thus, if the Agency determines that the matter which the shipper wishes to bring to arbitration should be more appropriately dealt with by the more general public interest appeal, then it may refuse to proceed further on the arbitration. There does not appear to be any shipper appeal of such a preliminary Agency decision precluding arbitration, foreseen in the legislation.

If the parties cannot agree on the selection of a particular arbitrator, the Agency will then choose one from a list which it has accredited, including professors, lawyers and traffic managers. Ironically, in one of the final offer arbitrations which occurred in 1989, the listed arbitrator who was selected by both parties was the vice president of transportation of a lumber company involved competitively in the issues under dispute. ⁸

Before rendering a decision, the arbitrator must take into account whether the shipper had adequate alternate means of transporting the freight. Other than this consideration, which is not determinant to the outcome of the decision, the arbitrator may choose any criterion which he judges to be appropriate in his deliberations.

In a previous draft of the legislation (Bill C-126), the following optional criteria were also suggested to the arbitrator, but these were withdrawn by the government in a subsequent modification to the Bill, at the request of the Canadian railway lobbyists:

- ☐ -changes in the cost of providing the transportation service;
- ☐ -any efficiencies in the service which have been instituted at the expense of the shipper;
- ☐ -the profitability to the carrier from the transportation of the freight in comparison to the profitability from transporting other goods;

- ☐ -the preservation of the economic viability of the shipper and the carrier;
- ☐ -the quality of the carrier's transportation service;
- ☐ -shipping practices in connection with the transportation service;
- ☐ -the national and international market conditions which pertain to the goods in question.

The decision of the arbitrator to accept either the railway or the shipper position must be rendered within 90 days from the date upon which the application is filed. In practice, however, it appears that the three month duration commences from the naming of the arbitrator by the Agency.⁹

The arbitrator's decision shall be rendered so as to apply for a maximum period of one year and no reasons for the decision need be elaborated unless both parties specifically request.

Where the Agency is advised that either party wishes to keep matters relating to the arbitration confidential, the arbitrator is instructed to take reasonable measures to ensure that the matters under litigation are not disclosed to the public (thus including plaintiff's competitors).

The arbitrator may additionally award reparations (see end note #113) in the decision, so that the rate determined will be deemed to have been in effect retroactively from the date of the shipper's application.

The decision of the arbitrator is final, other than the appeals to the Courts, which could only be made based upon the principles of law or natural justice, such as a disrespect of the rule of due process or of "audi alteram partem".

Final offer arbitration cannot be used in conjunction with a public interest appeal. This regulatory mechanism is specifically not available to shippers of intermodal movements (trailers or marine containers on flat cars for import/export traffic), unless the port of entry is served by only one railway, nor can such statutory proceedings be used to change the terms of a confidential rail contract agreement once signed between a shipper and the carrier.

b) STRATEGIC CONSIDERATIONS

There are three further structural facets of the statutory provisions relating to final offer arbitration which warrant consideration. First, the process may be seen as one which by its nature constitutes a private settlement of a rate dispute, rather than a matter of public order. If during the arbitration proceedings or even subsequent to the decision, both parties agree to qualify the decision's implementation or even to disregard it, there appears to be no recourse which can be taken by a third

party.

Therefore, assuming that the parties were to subsequently agree that they would substitute the arbitrator's decision by a different set of rate and service conditions within, for example, a longer term confidential contract, there is nothing in the legislation to prevent such an occurrence.

Second, as final offer arbitration does not apply to contracts, the rate decision of the arbitrator will generally result in the revision of a published tariff, which can then be discovered by any of the shipper's competitors which monitor tariff changes. Thus, even though the proceeding itself may be confidential, the result of the arbitration may lead to other shippers asking for similar rate concessions from the carrier and consequently benefitting from the risk taken by the initial complainant.

Third, the question of exactly what the arbitrator is to decide may be as important as the final decision. At the outset of the final offer arbitration proceedings, there may be a substantial clash between the shipper and the carrier as to the parameters of jurisdiction of the arbitrator. For example, the shipper may wish to submit an offer which relates to a minimal percentage of the latter's traffic so as to minimize the risks of losing the arbitration. By contrast the carrier may counter, as its last offer, a rate which is conditional upon the shipper's entire annual volume being shipped. Similarly, the number of routes, ancillary services, delivery times and penalties may all constitute separate issues which the arbitrator will have to decide upon initially and which may be the subject of further legal appeal proceedings.¹⁰

Of the strategic elements which derive from such a regulatory structure, the shipper may tend to submit a more conservative final offer due to the railway's above-described ability to revise its last offer within ten days of the initial notice, as well as the arbitrator's obligation to select only one of the parties' proposals, rather than developing a compromise solution. As this mechanism may only be initiated at the request of the shipper, the latter appears to have the advantage of completing its preparatory economic and market consulting studies prior to the 90-day statutory time frame being triggered. Conversely, as there are but two transcontinental railways in Canada, the confidential nature of the arbitration proceedings makes it likely that each railway would benefit from the experiential knowledge of precedent cases, whereas the atomistic shipper-plaintiff would be facing a myriad of procedural and argumentational options for the first time.

c) FOA CASES SINCE ENACTMENT OF CANADIAN LEGISLATION

Since the implementation of the National Transportation Act in January, 1988 until January, 1990,

only four shippers have initiated cases of final offer arbitration which have been pursued before the National Transport Agency.¹¹

The development of these few cases has provided some insight into whether this component of the Canadian government’s legislative solution to the problem of transborder diversion and to the public policy representations of pressure groups constitutes an effective regulatory response.

Upon the Act’s proclamation in 1987, the senior management of both railways were predictably disillusioned and apprehensive at having suffered such a major defeat to their policy recommendations. This insecurity may have been one of the causal factors which led both CN and CP Rail to embark upon an unprecedented period of extending rate discounts to hundreds of their larger customers in the form of confidential contract rebates. Charts XXXIII and XXXIV demonstrate the significant activity in this area.¹²

CHART XXXIII

CONFIDENTIAL RAIL CONTRACTS CN & CP
MARCH 1988 TO APRIL 3, 1989

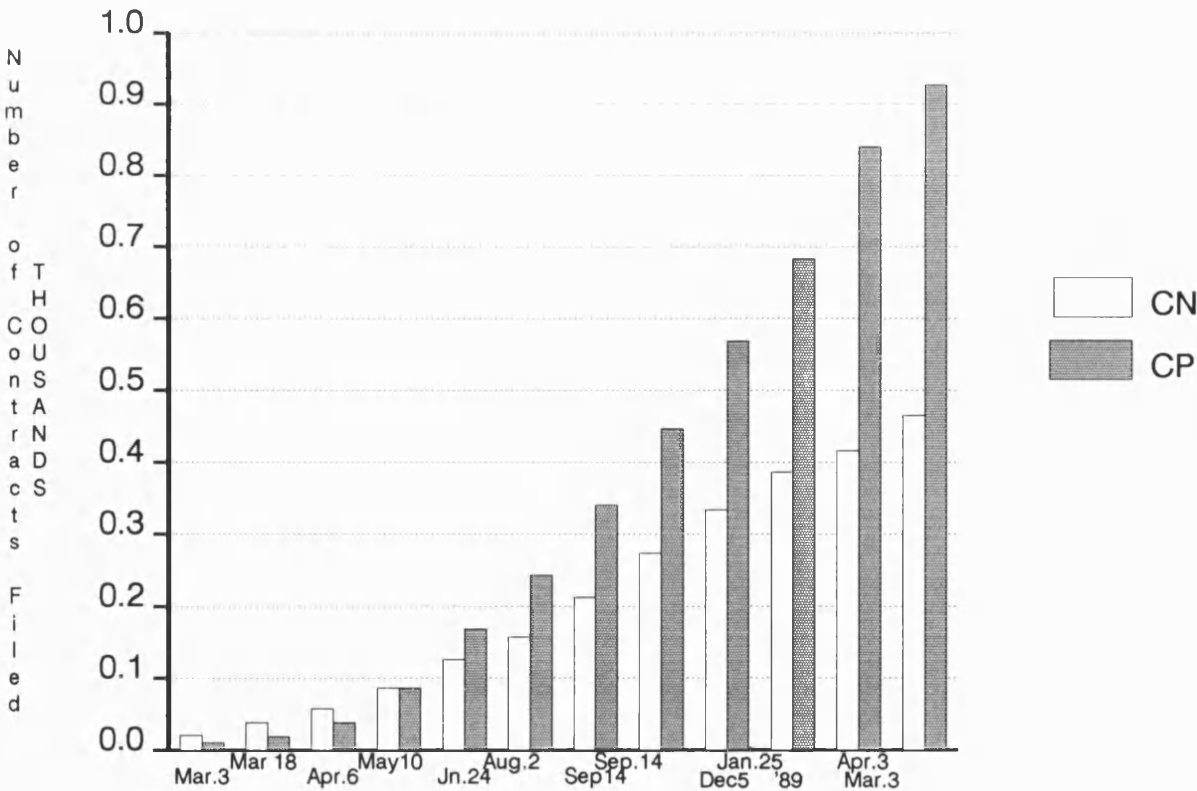
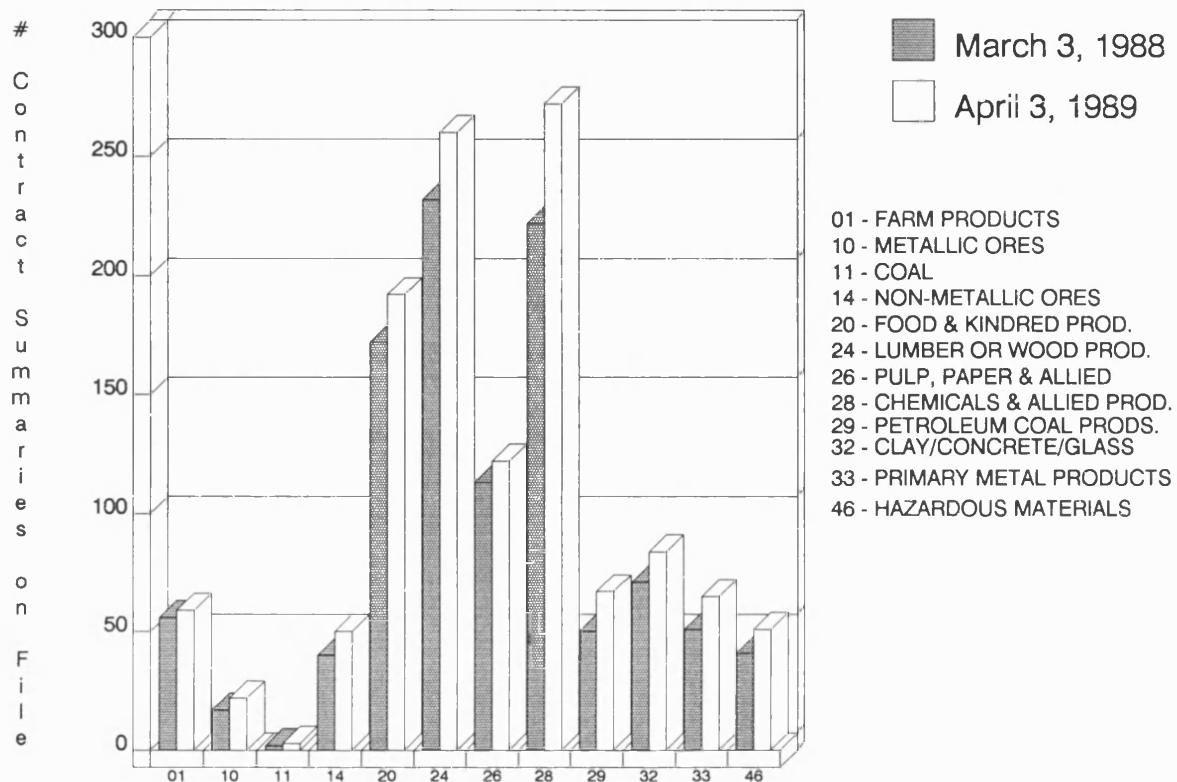


CHART XXXIV

CONFIDENTIAL CONTRACTS ON FILE WITH NTA SELECTED COMMODITIES



In evaluating the experience of approximately forty companies in the drafting and review of their rail confidential contracts in 1988, there appeared to be surprisingly little differentiation in the discounts given to shippers based upon either their captive or competitive location.¹³

It was during this initial period of perceived regulatory uncertainty by the Canadian railways that the final offer arbitration mechanism appears to have exhibited a significant influence as a deterrent to carrier-dominant rate negotiations. As an example of the dramatic effect which the threat of FOA had in 1988 upon Canadian National, consider the case of Cushman Lumber Company, a lumber wholesaling enterprise, situated in Sharon, Vermont, purchasing kiln-dried dimensional spruce lumber from British Columbia. According to owners Messieurs E. and H. Cushman, they had never personally met anyone from CN's marketing department during the previous six years of their involvement in the business, even though they ordered 200-300 carloads of lumber, F.O.B. destination, per year (a freight revenue of approximately \$1.5 million annually) which was transported across Canada by CN to a destination on the

latter's U.S. subsidiary, the Central Vermont Railway.

In 1988, Cushman Lumber suffered serious market attrition which they perceived to have been due to contractual rebates which were being given on similar B.C. originating movements by CN to a much larger lumber competitor situated in Vermont, i.e. Georgia Pacific Ltd. Cushman Lumber proceeded to send letters explaining their predicament regarding their loss of market share and attempted to telephone CN's marketing department, all of which efforts received no response from the railway.

The 15-day pre-notification of final offer arbitration was subsequently sent to the general counsel of CN on behalf of Cushman Lumber, on Dec. 8, 1988. Within two days, Mr. E. Cushman received a telephone call from Mr. J. Metsos, CN's assistant vice-president, lumber products marketing, apologizing for not having communicated sooner and requesting that arbitration proceedings not be initiated until a full discussion of the issues were conducted between the parties. Mr. Metsos phoned Mr. Cushman several times daily until a meeting was held on Dec. 20, 1988 at St. Albans, Vermont. On Dec. 21, CN offered Cushman Lumber rebates which were similar to those the claimant suspected of having been extended to Georgia Pacific Ltd.,¹⁴ on condition that the company desist from all further proceedings related to final offer arbitration.

The expeditious resolution of this matter subsequent to the receipt of the final offer arbitration pre-notification, when combined with the seeming disinterest by CN in dealing with the customer's problem previously, suggests a strong correlation between the threat of this regulatory mechanism's being exercised and the shipper's power in freight rate negotiations.

In January, 1989, CN wrote to the National Transportation Agency in a matter unrelated to any particular contested dossier asking the hypothetical question of whether an arbitrator could lawfully be given access to confidential contracts, all of which were required by the new transport legislation to be filed with the Agency in confidence by the railway within 15 days of their having been signed.¹⁵ Although the Agency officials may not have realized the significance of the question at the time, CN's law department was perhaps inquiring whether, if the Cushman Lumber case had been pursued, the arbitrator would have had access to the Georgia Pacific rebate contract.

When the Agency responded in a provisional manner to the effect that arbitrators would not likely be permitted to inspect any of the confidential contracts on file, the strength of the final offer arbitration mechanism as a deterrent force appears to have waned.¹⁶ Thus in a subsequent arbitration case involving Tall Tree Lumber, a wholesaling firm situated in Ontario which was claiming rebates on F.O.B. destination

Western Canadian lumber movements by CN into the Windsor and Niagara Falls, Ontario border points, similar to concessions allegedly given to their larger competitors,¹⁷ the railway's marketing department did not even respond to the 15-day legal pre-notification. Upon initiation of the final offer arbitration proceedings, the railway's general solicitor attached the above-described Agency "ruling" as evidence that the plaintiff's allegations regarding CN rebates to competitors could not lawfully be examined by the arbitrator.¹⁸ The realization that the arbitrator would not be permitted to take cognizance of and compare the CN rebate contracts given to their larger competitors greatly diminished the strength of Tall Tree Lumber's claim for similar concessions and caused the company to immediately seek a marginally satisfactory out of court settlement and subsequently desist from its claim entirely.

Another example of the restrictive interpretation which has been given to the FOA statutory provisions by the National Transportation Agency may be found in the TNT Railfast arbitration case. This shipper, which in 1989 had paid to CP Rail freight charges of approximately \$15 million for the movement of both dry and insulated 40' and 50' boxcars from Montreal and Toronto to the Atlantic and Western provinces respectively, had suffered an annual loss of \$1.7 million due to what its senior management perceived to be excessive freight rates. On August 8, 1990, this shipper sent its FOA pre-notification to CP Rail requesting a reduction in the 1991 rate levels. TNT Railfast had selected this pre-1991 timeframe because a negative arbitration award of the 16 carloads designated would have necessitated the termination and renegotiation of four terminal leases of facilities on CP Rail trackage (Winnipeg, Toronto, Montreal, Calgary), some of which had 2-3 month cancellation clauses, as well as the required moving preparations and telephone re-installation. CP Rail refused to quote a rate for 1991. The Agency, on August 17, 1990, determined not to process the arbitration hearings on the grounds that the railway had not given its last offer and thus one of the obligatory pre-conditions to the statutory mechanism's being triggered was missing. This literal construction of the statute rendered the shipper's usage of FOA mechanism inoperative.

d) CONCLUSIONS REGARDING EFFECTIVENESS OF FOA STRUCTURE

If one were to examine whether this regulatory mechanism had effectively addressed either the problem of transborder diversion attributed to Staggers (Part I of the thesis) or the policy concerns expressed by pressure groups during the legislative debate (Part II), the answer would likely be in the

negative. Rather than harmonize the previously divergent regulatory regimes between Canada and the United States, as they applied to rail and air cargo transport, final offer arbitration created a new distinction which further separated the rate negotiating environments of the two countries. Moreover, the above-cited structural weakness of not having access to the confidential contracts of the commodity group being examined, would make it more difficult for the arbitrator to assess the reasonableness of the respective final offers in the context of the carrier's current pricing policy as it pertained to that industry. The fact that only two FOA's per year have been initiated before the National Transportation Agency appears to indicate that this recourse is not popular, nor perceived as an effective strategy among Canadian shippers.

Assuming that the objective of this regulatory mechanism's inclusion in the legislation was to respond to the concern of shipper pressure groups regarding discrimination or inequitable rate-setting practices by providing a binding "second opinion" methodology which would serve as a supple, inexpensive and informal deterrent, the above-described experience appears to indicate that final offer arbitration has not proven itself to be an adequate means of resolving the difficulties engendered by carrier-dominant negotiations.

END NOTES

1. *For a detailed analysis of the legislation, see Lande, R., Railway Law and the National Transport Act, Butterworths, Toronto, 1989.*
2. *Supra, Part I, end note 23, Part II, end note 116, Chapters 9(i), 11(a) and 11(e).*
3. *Supra, Part II. Also, Lande, R. Railway Law and the National Transportation Act, Butterworths, Toronto, 1989, pp. 76 et seq.*
4. *The concept of final offer arbitration has often been credited to Professor Carl Stephens for his article entitled, Is Compulsory Arbitration Compatible with Bargaining? Ind. Rel. 38 (1966). Although not previously known in the area of transportation, final offer arbitration had been accepted as a method of resolving public employee disputes in the US, particularly with regard to firefighters and policemen. For an analysis of final offer arbitration in U.S. professional baseball, see Lande, R. and Weckstein, D., Final Offer Arbitration: Hard Hitting Advice to Canadian Transportants, Canadian Transport Research Forum, 1986.*
5. *Sections 47-57 of National Transportation Act, s.c. 1987, c.34. These provisions were initially intended to apply to the truck mode as well, but were revised in Bill C-18, given that interprovincial motor carrier regulation had been delegated in 1954 to the provincial legislatures.*

6. Tall Tree Lumber Ltd. vs. C.N., letter from Mr. Serge Cantin, general counsel, C.N., to National Transportation Agency, 1989.
7. Hunt Wesson (Beatrice) Ltd. vs. C.P. Rail, letter from Mr. David Flicker, Associate V.P. Law, C.P. Rail, to National Transportation Agency, 1989.
8. In Tall Tree Ltd. vs. CN, the parties negotiated a settlement prior to the involvement as arbitrator of Mr. John Darker, V.P. Transportation, Weldwood of Canada Ltd.
9. Op. Cit. Tree Lumber vs. CN.
10. Certain Australian railway contract arbitration clauses have thus been the subject of subsequent litigation based upon one of the parties not accepting the arbitrators preliminary ruling as to the parameters of the decision to be rendered. See Lande, R., Railway Legislation and Rate Contracts in Canada and Australia, Australian Government Publishing Service, Canberra, 1988.
11. This was confirmed by Mr. K. Mazursky, Director, mediation and arbitration branch, National Transportation Agency, in 1989. The four arbitrations which are herein discussed, as well as two subsequent FOA cases which were initiated in the latter part of 1990, were all taken by clients whom I represented before the National Transportation Agency.
12. During 1988, the average rebate in approximately 60 confidential rail contracts which I drafted or reviewed for various shippers, was approximately 10% less than the respective commodity published rates.
13. This was not the case in the U.S., according to the 1984 U.S. Congressional Report on the Effect of Staggers Act, Senator Adams, Transportation Committee Chairman.
14. Although the CN Georgia Pacific rebate contract was confidential, this rebate estimation was made based upon the reduction in the latter's lumber prices, as well as subsequent interviews in 1989 with other Northeastern U.S. lumber wholesalers which received or were offered CN rebates into the same area (Mr. L. Nystrom, president, Seaboard Lumber, Nashua, New Hampshire and Mr. J. Keough, V.P., transportation, 84 Lumber, Pittsburgh, Pennsylvania).
15. Section 120, National Transportation Act, 1987. In practice, both CN and CP Rail have often times delayed filing with the Agency for months subsequent to the actual rate agreement, allegedly due to a contract drafting backlog.
16. Letter by Ms. S. Clement, Secretary, National Transportation Agency to Mr. S. Cantin, general counsel, CN, Feb. 1989.
17. Rebates were informally acknowledged in 1989 discussions, as having been given to Tall Tree Lumber competitors such as Green Forest Lumber, Block Lumber, Rivendell Forest Products, and Universal Forest Products, respectively, by Messrs. H. Berkenbosch and J. Metsos, CN's general manager and A.V.P. lumber products.
18. Tall Tree Lumber vs. CN, response by CN general counsel, Serge Cantin to National Transportation Agency, March, 1989.

Chapter 14:

PUBLIC INTEREST EQUITY APPEAL

Introduction

The objective of this chapter is to further examine Hypotheses IX and X, which have been outlined in the introduction to Chapter 13, through an analysis of this next statutory mechanism which was included in the remedial Canadian rail legislation.

An innovative facet of the 1987 Canadian transportation legislative solution which addressed the problem of shipper discrimination inherent in contract confidentiality was to be found in the equity appeal.¹⁹ As has been described above,²⁰ the previous regulatory regime permitted an investigation of published rate level differentiation by the Canadian Transport Commission based upon public interest considerations. The Canadian policy-makers were faced with the question of how such a legislative recourse could be effectively adapted if the preferential treatment by a railway of a given shipper could be hidden under the guise of a confidential contract, which structure was to be included in the new legislation (see Charts XXXIII and XXXIV).

a) PROCEDURE

The Canadian government's response to the above conundrum was to create the public interest equity appeal, which is presently encapsulated in the following subsection of the new transport statute:

60. "The Agency shall, in conducting an investigation (pertaining to the public interest) have regard to all considerations that appear to it to be relevant to the matter, including...

(d) whether an existing confidential contract with another shipper for transportation of a substantially similar product under substantially similar conditions creates an unfair disadvantage by providing a lower freight rate or better shipping conditions that cannot be

justified by any cost or efficiency factor."

The relatively simple procedure envisaged so as to invoke the above provision is as follows: If a shipper suspects that its competitor(s) is receiving a confidential rail contract which extends more favourable rate or service treatment than the shipper is receiving from the applicable published tariff, the plaintiff need only submit a complaint to this effect before the National Transportation Agency for a public investigation to be initiated. The Agency will proceed to independently research the relevant confidential contracts which have been obligatorily filed, as well as to examine the railway's defence which must be submitted within 30 days, and may then require the railway by written interrogatories or during an in camera hearing at which the complainant is not present, to justify the reasons for the rate or service differentiation between the confidential freight contract(s) under examination and the published tariff.

If the Agency is not satisfied with the railway's economic justification of the degree of variance between the contract and tariff, it may determine that the margin of advantage extended by the defendant railway to certain shippers by confidential freight contracts is discriminatory and thereby deprives the complainant of an equal opportunity to market its similar commodity. The Agency would then order, within 120 days of the initial submission, that the tariff to which the complainant were subject be amended retroactively to the case's commencement date, so as to either lower the freight rate, augment the rail equipment or service commitment, or follow any other regulatory directive which would, in the public interest, render the applicant shipper's transportation cost to be more equitably derived.

b) STRATEGIC CONSIDERATIONS

The strategic implications relating to the above equity appeal mechanism are as diverse for railway-shipper freight rate negotiations as for the final offer arbitration component of the new legislation and it is not the intention of this thesis to explore in a comprehensive manner the full range of options which could theoretically be pursued by involved parties. In general, the advantages of a shipper's attempting to employ this regulatory structure as a means of procuring a confidential contract offer from the railway similar to the ones suspected of benefitting its competitors, appear to outweigh the disadvantages for the following reasons:

- 1) As the shipper cannot know with any specificity the contents of its competitor(s) confidential freight contracts, the level of evidentiary onus incumbent upon the complainant to cause this inquiry into possible discrimination is of necessity, minimal.

- 2) Unlike final offer arbitration, wherein the shipper is obliged to pay one-half of the arbitrator's fee, there is no infrastructural expense incurred by the complainant when utilizing the equity appeal recourse, other than that of the legal or economic consultants who may be selected.
- 3) Even if the shipper does not know which, if any, or the extent to which its competitors are receiving rebates from the railway, the Agency may examine, in order to ensure fair treatment by the carrier of the complainant, all of the confidential contracts on file within the relevant commodity group, as well as any contracts which have been provisionally agreed, but not yet filed, if these are subpoenaed.
- 4) Given that much of the verification by the Agency involves a comparison between a tariff and certain competitors' contracts which the complainant is lawfully prohibited from seeing, the time involvement by the shipper, once this recourse has been set into motion, is minimal.

c) EQUITY APPEAL CASES SINCE ENACTMENT OF CANADIAN LEGISLATION

Since the enactment of the new Canadian transport legislation in 1988, only six cases of the public interest equity appeal have been pursued, and two of these regulatory experiences shall be herein described.²¹

In May 1988, a group of fourteen imported automobile companies which were members of the Importers Association of Canada expressed an interest in utilizing some of the opportunities contained in the new transport legislation and in particular, consolidating, where feasible, their traffic volumes in order to benefit from more cost effective surface transportation arrangements than any of them could be expected to achieve individually.

After four months of analysis and discussion, eleven²² of these car importers decided to incorporate as a buyers' group governed by an internal discrimination formula which would require smaller and medium-sized members to give a portion of their freight savings to larger members in order for the latter to remain greater beneficiaries within the group.

Thus in September 1988, the Importers Transport Council (as the buyers' group was subsequently named) requested CN, CP Rail, Conrail and Burlington Northern to separately submit bids for a multi-year confidential contract which would involve over \$100 million of annual freight revenue to the carrier(s) ultimately selected, deriving from the inland rail movement of Asian and European cars through the Ports

of Vancouver/Seattle and Halifax/New York respectively. CP Rail and Conrail individually met with the Council's negotiators soon afterwards and expressed their willingness to submit comprehensive bids which would encompass the rate, service, equipment, and liability requirements of the Council, according to the prescribed negotiating agenda.²³ By contrast, Burlington Northern did not respond to the repeated requests by the Council to participate in the bidding process²⁴ and CN categorically refused to negotiate with the group, preferring instead to meet with the members separately and offer them substantial rebates conditional upon their signing individual freight contracts.

By pursuing this strategy, CN was able to cause both Mercedes Benz and Volkswagen to withdraw from the Council and to thus jeopardize the future viability of the buyers' group. CN's opposition to the Council was perhaps based upon the fact that the railway had previously held most of the market share of such imported automotive vehicle movements, the European portion having customarily entered through the Port of Halifax which was served exclusively by CN,²⁵ and thus feared that this negotiating exercise could only produce a decrease in the future volumes of this traffic and/or its traditional profitability. Moreover, CN may have sensed a threat in the Council's buyer group strategy establishing a precedent for other commodities in their respective rate negotiations.

By January 1989, the Council's survival was imperilled due to CN's above-stated refusal to meet with the group. The Council had no alternative but to serve a public interest equity appeal draft "Declaration of Applicant" upon CN's general counsel, with the qualification that the regulatory process would be formally initiated before the National Transportation Agency if serious rate negotiations did not commence forthwith. This draft Declaration, which documented the frustrated efforts of the Council to meet with the railway for the previous six months, requested that the Agency compare the tariff increases which Council members were paying with the contract rebates which CN had extended to "domestic" automotive manufacturers such as GM, Ford and Chrysler, as well as the confidential incentives it had offered to certain automobile importers in order to have them withdraw from the Council.

Within a few days of the draft Declaration's having been sent to CN, the railway consented to meet with the Council's negotiators, with the understanding that the equity appeal would not be formally initiated before the Agency. By May 1989, a confidential rebate contract was agreed between the parties.

26

Another example of the effect of the public interest equity appeal as a deterrent influence upon the railways may be found in the case of Schenker of Canada Ltd., a freight forwarding company which

consolidated import shipments of various manufactured commodities into full trailer load longhaul rail movements for subsequent distribution across Canada.

Although Schencker represented the largest demand for trailers to be transported on rail flatcars from Vancouver, where the company's breakbulk terminal was situated, to central Canadian destinations such as Toronto, the company's senior executives had been unsuccessful in obtaining a confidential contract offer from their customary carrier, Canadian National, this despite repeated meetings and correspondence with the railway's management during 1988. In consequence, Schencker was required to pay the same published tariff as its smaller freight forwarding competitors in Western Canada²⁷ and was experiencing market attrition which it perceived as being the result in part of a combination of lower freight rates extended to certain Asian steamship lines by U.S. railways through the west coast entry ports of the states of Washington, Oregon and California thence, to be transported by double stacking of containers along certain U.S. rail corridors to Canadian border gateways - an equipment innovation not then accepted by Canadian railways, and the fluctuation in the currency exchange rate which had steadily increased the relative value of the Canadian dollar in comparison to the U.S. dollar during 1987-1988.

In early January 1989, a legal notice²⁸ was sent to CN threatening the initiation of a public interest equity recourse unless meaningful contract negotiations could be implemented. Within two weeks of this communication, a CN marketing delegation visited the Schencker executives in Vancouver and proposed a confidential contract. As Schencker were still not satisfied with the level of rebates offered, the company filed an equity appeal before the National Transportation Agency in February 1989, alleging discrimination as compared with the contracts which they suspected had been given by CN to certain Asian steamship lines entering Canada through the east coast Port of Halifax, (after circumnavigating the Panama Canal) whose containers were destined for identical central Canadian destinations.

Prior to the 30-day delay within which the railway would have been compelled to submit their formal defense to the Agency, a more senior delegation from CN headquarters in Montreal visited the Schencker management and proposed a multi-year contract rebate schedule conditional upon the shipper's legal desistment being filed, which was then deemed acceptable by the complainant.

Although the above two instances provide evidence of the positive influence which the equity appeal mechanism has exercised in freight rate negotiations, the following two cases demonstrate the contrary. In 1989, Forest City Trading, a U.S. company regrouping eight lumber wholesalers applied to the National Transportation by virtue of Section 60(d) of the Act, in order to obtain rebates on lumber

originating in British Columbia and destined to the midwest and southeast U.S., similar to those they believed CN was extending by confidential contracts to approximately ten of their competitors. Forest City identified over 10,000 carloads of lumber which their company had caused to be transported by CN during the previous year and identified by name those lumber wholesale competitors whom they believed had received contractual rebate agreements of \$300-\$400 per car. As none of these competitors had the cumulative rail volumes as Forest City, this applicant would have expected an even larger per car rebate, based upon scale.

The National Transportation Agency rejected the claim on the grounds that a) Forest City was the consignee, not the shipper and therefore did not "control" the movements, b) Forest City did not possess the bills of lading for the carloads in question and c) an internal investigation of the lumber contracts filed with the Agency did not reveal that any other lumber wholesalers had benefitted from rebate contracts. This decision exhibited a weak logical justificatory framework for the following reasons:

- 1) A consignee who orders 10,000 carloads of lumber annually exercises an important degree of control over the logistical arrangements and should not be excluded from using the statutory freight rate recourses merely because it was not the origin shipper.
- 2) The possession of bills of lading, per se, does not justify a category of transport service user which should be uniquely qualified to apply for an equity appeal; Chapter 8(b) has elaborated upon the different types of demand which, sometimes in combination (for example, steamship lines and freight forwarders), may play a significant role in the selection of a rail carrier.
- 3) The fact that the Agency was unable to locate any comparable rebate contracts between CN and the ten designated lumber wholesalers should have prompted a further investigation into whether Forest City's competitors did or did not have such confidential benefits. Interviews with CN and several of these competitors have shown that the latter did in fact receive these per car rebates, but that CN was contravening the legal requirements of the Act by either not signing the contracts while giving them retroactive effect, or by not filing the contracts until the equity appeal had been decided.

Another example of the Agency's interpretation of the public interest equity appeal which has served to discourage applicants was manifested in the Container Port of Saskatchewan case. Container Port applied to the National Transportation Agency on March 20, 1990 in order to obtain a similar rate level as they believed was being obtained by their competitor, Alberta Intermodal Services, by confidential

rail contract. The Agency, approximately two weeks prior to its statutory 120 day deadline, requested the consent of all interested parties so that public hearings could be held in late September. Container Port explained to the Agency that were a decision not rendered by the due date foreseen by the legislation, the applicant would be commercially prejudiced as a) the two million dollars of funding which had been approved by the Western Diversification Office was conditional upon Container Port beginning operations in 1990, which commencement would not be possible without a satisfactory level of railway rates and service, and b) the construction of the container terminal at a site to be purchased in proximity to either CN, CP Rail or BN trackage, dependent upon the Agency's ruling, would have to be delayed until the spring of 1991 as the cement foundations could not be poured due to freezing temperatures after November, 1990. In addition, five other intervenants, including the Department of Transportation for the Province of Saskatchewan, the Saskatoon Chamber of Commerce and certain meat-packing firms intending to use Container Port's services all opposed the extension of the 120 day statutory decision period. The law relating to such extensions states that unless all parties consent, the Agency does not have the authority to render its decision beyond the 120 day delay:

Section 62(4) -The Agency shall render its decision on an investigation under Section 59 not later than one hundred and twenty days after the Agency receives the request for investigation unless the parties agree to an extension.

The Agency determined nonetheless not to render a timely decision, but rather to call public hearings for the fall and Container Port's above-mentioned Western Diversification Office funding was thereby jeopardized and the construction delayed in consequence. The Agency subsequently ruled against Container Port, stating that the existing CN rate structure "did not prohibit export trade from Saskatchewan".

d) CONCLUSIONS REGARDING EFFECTIVENESS OF EQUITY APPEAL STRUCTURE

Therefore in the Importers Transport Council and Schencker cases, the inclusions of the equity appeal mechanism within the new Act appears to have caused CN to be more amenable toward rate concessions and to have thus strengthened the shipper's negotiating power significantly. However, the Forest City Trading and Container Port of Saskatchewan cases may have in contrast limited the perception by Canadian shippers that this recourse should be used in order to assist in the resolution of any impasse

involving a railway's discriminatory pricing.

Although it is too early to ascertain whether the Agency will give a strict interpretation to the critical statutory clause "substantially similar conditions", it is pertinent to examine if this provision effectively addresses a) the problem of transborder diversion and b) the concerns of industry pressure groups which have been described in the earlier Parts of this thesis.

Both Canadian railway and shipper interests had complained vigorously due to the previous divergence between the transparency of Canadian transportation costs, as compared with international and domestic U.S. confidential rate contracts permitted by the Staggers legislation, which difference in regulation was perceived to have allowed U.S. railways to treat the Canadian published tariff as a target price which could be secretly undercut in order to encourage U.S. longhaul routing. Therefore the decision by the Canadian government to include confidential contracting in the National Transportation Act, 1987 was intended to curtail the revenue attrition described in Part I, which was being experienced in transborder traffic flows since 1980.

However, the public interest equity appeal is a structure without parallel in the Staggers Act and may thus be viewed as both creating a new disharmony between the regulatory environments of both countries and of undermining the element of justifiable price differentiation which strict contract confidentiality would have ensured to the carriers.²⁹ Moreover, in attempting to combine such conflicting legislative objectives as rate confidentiality and rate equity (through the creation of this appeal process), the Canadian government may have proven unresponsive to the stated intention of many shippers to become more competitive by the negotiation of individual confidential contracts, rather than having rate equality apply to their entire commodity group through published tariffs. Once a shipper had assumed the significant risks involved in being bound by a comprehensive and unique transportation service package with a railway, would it not be frustrating for the risk-taker to see its negotiated advantages being extended to competitors using the equity appeal, through the intervention of the National Transport Agency? It is also noteworthy that between 1988 and 1990, only two equity appeals per year have ever been initiated by Canadian shippers, which appears to indicate, as with final offer arbitration, that the legislative drafting of these recourses was inadequately structured so as to offset the traditional passivity within the Canadian shipper culture to contest rate decisions by seeking regulatory intervention.

In conclusion, the equity appeal, despite its above-described deterrent effect in certain instances, appears to have the following structural flaws:

- 1) Since the application is based upon suspicion of preferential treatment of one's competitors by a carrier, the applicant will be uncertain of what rate concessions to request and whether an eventual decision in his company's favour by the Agency has given sufficient reparations.
- 2) The inclusion of this regulatory mechanism within the public interest section of the new legislation may have been inappropriate given the private interest orientation of the equity appeal wherein an individual company attempts to lower its particular freight rate level.
- 3) There appears to be an unintended duplication in the legislative objectives of final offer arbitration and the equity appeal recourse respectively, with the further unplanned qualification that the former option is less likely to be selected by shippers as they would be required to pay for one half of the arbitrator's fee and have a more onerous legal burden of proof.
- 4) An equity appeal decision in favour of the shipper would carry no obligation to use such a reduced rate, whereas the confidential contracts upon which such a comparative ruling was based would in all probability involve a distinct volume and duration commitment.

END NOTES

19. Section 60(d), *National Transport Act, 1987* was added on to the previously described public interest appeal i. e. Section 23 of the precedent statute became Section 59 of the new legislation
20. *Supra*, Part II, end note #3.
21. Of the appeals by virtue of Section 60(d) also taken in 1989 and 1990, but not discussed in the thesis, Costa Cartage Ltd. vs CN Rail, Alpa Lumber vs CN Rail, Daigle Lumber vs CN Rail, Carter Group vs. CN Rail, and Prairie Malt vs. CN Rail. With the exception of the Prairie Malt case wherein the shipper decided not to seek legal counsel, I have represented all of the other applicants in these public interest appeals before the Agency.
22. *Honda, Toyota and Mazda* decided at that stage not to join the buyers' group and to pursue their rail and truck rate negotiations individually.
23. *CP Rail* was primarily interested in gaining market share from the Council's Asian members through the Port of Vancouver, whereas *Conrail* was aiming to attract the Council's European members away from the Port of Halifax (CN captive) in favour of the Port Elizabeth, New Jersey.
24. This was not considered to be a development critical to the Council's intended achievement of volume

discounts, given that BN did not possess any of the Canadian imported automotive vehicle market share previously. It may be that the BN was hesitant to submit a competitive offer either due to its fear that this would jeopardize its relationship with CN with which it had a 10-year joint marketing and operating agreement, or that its offer would merely be used as a target price by the Council.

25. *Supra, Chapter 11(a).*

26. *The members of the Importers Transport Council include Nissan, Suburu, Suzuki, Saab-Scania, BMW, Jaguar, Lada, Skocar and Peugeot, with the representative from Nissan becoming chairman of the board and the representative from Saab-Scania as vice-chairman.*

27. *These smaller competitors included Kuehne and Nagel, Panalpina, Locher Evers and Metrains respectively.*

28. *This letter was dated Jan. 8, 1989 and signed jointly by Messrs. Horst Kuebler and Arnold Da Silva, Senior V.P. and V.P. respectively for Schencker of Canada.*

29. *In an interview with Mr. P.A. Clarke, Senior V.P., Marketing, for Canadian National in March 1989, it was stated that if many more of the equity appeals would be filed with the Agency in the future, CN would no longer be predisposed to extending confidential contracts to as many of its shippers.*

CHAPTER 15:

COMPETITIVE JOINT LINE RATE APPEAL

Introduction

The objective of this chapter is to evaluate Hypotheses IX and X which have been outlined in the introduction to Chapter 13.

As has been discussed in Part II, the Canadian government's decision to include the competitive joint line rate appeal (herein referred to CLR) provisions in the new legislation was adamantly opposed by the senior management of both transcontinental railways, who predicted that this regulatory mechanism would cause substantive harm to their respective financial positions.³⁰

Similar to the final offer arbitration and equity appeal provisions, whose general purpose was to enlarge the freight rate negotiating power of Canadian shippers by instituting the option of regulatory intervention in the event of perceived intransigent carrier behaviour, the objective of the CLR recourse was to diminish the effects of locational captivity upon industrial users of railway service who were situated beyond the newly expanded 30 km interswitching zone.³¹ The rules governing the manner in which such regional facilities were intended to neutralize the monopolistic pricing practices of the railway to which they were dependent are described herein.

a) PROCEDURE

Whenever a Canadian shipper's plant were served by only one rail carrier at origin or at destination (herein referred to as O/D), and the shipper wished to transport the plant's merchandise for a portion of the haul via a second more distant railway (whose trackage connected with that of the local carrier within 750 miles of the captive O/D) thereby depriving the local carrier of its preferred longhaul routing, then the CLR recourse may be employed. The shipper would first negotiate a freight rate

agreement with the second carrier (which could equally be a U.S. railway for a movement through U.S. territory), and could then compel the first carrier to transfer the merchandise at the designated connection and be subject to a statutory formula resulting in a rate no higher than that charged by the second carrier. Thus the local carrier could no longer "protect" its longhaul routing as it had under the previous legislation by charging an excessively high rate so as to discourage usage of its shorthaul routing.

Using the following diagram (Chart XXXV) concerning woodpulp movements from Western Canada to the U.S. northeast, the shipper in this example would theoretically be able to utilize the CLR provisions since their mill at Medicine Hat, Alberta is captive to CP Rail. By virtue of this new recourse, the shipper could force CP Rail to establish a CLR at the Coutts, Alberta Interchange "B" with the Burlington Northern (a connection within 750 miles of the origin), thereby depriving CP Rail of its desired longhaul revenues derived from its preferred longhaul routing over North Portal, Saskatchewan (Interchange "A"), thence to be routed by its subsidiary the Soo Line.

Once the shipper had opted for the CLR mechanism, CP Rail would lose its legal ability to determine the price for the Medicine Hat to Coutts segment, as the rate would be set by a statutory formula which was partially prorated upon the BN rate.³²

Thus the CLR provisions were intended to provide captive shippers with additional routing options by enabling a second more distant railway not only to bid realistically upon its portion of a previously unused joint routing, but also to have its own rate on that portion apply upon the local railway's segment of the movement (on a proportional mileage basis).

In the event however the BN rate was not intended to be publicly divulged as it was included in a confidential contract, and thus could not serve for the purposes of the above statutory formula's implementation, the calculation of the competitive joint line rate from Medicine Hat to Coutts, Alberta would instead be based upon CP Rail's tariff rates for woodpulp movements which originated at non-captive origin points (such as Vancouver) whereby CP Rail would already be competing directly with another rail carrier for the traffic.³³ This quasi-expropriatory CLR regulation thus relieved the local carrier of its previous right to set what it determined to be an appropriate price disincentive for usage of the Interchange "B" gateway, for rail transport services and appears to demonstrate the governmental objective of reducing the impact of locational shipper captivity at the cost, if necessary, of deprivation of carrier freedoms.

CHART XXXV

EXAMPLE OF COMPETITIVE JOINT LINE RATE



b) STRATEGIC CONSIDERATIONS

There were however certain legislative restrictions to the utilization of the CLR mechanism. Firstly, a U.S. railway could not become involved in a competitive joint line rate if the captive movement to be substituted were either domestic or to or from a Canadian port where there existed an alternate routing entirely within Canada that was deemed by the Agency to be "cost effective".³⁴ This qualification thus was intended to restrict the CLR provisions (as they pertained to possible U.S. railway competition) to transborder Canada/U.S. traffic and would thus have prevented this regulatory mechanism from applying to either U.S. to U.S. overhead movements or to the possibility of a U.S. port diverting traffic away from a Canadian port.

Secondly, the competitive joint line rate provisions did not apply to piggyback or intermodal traffic such as trailer on flat car (TOFC), container on flat car (COFC) or less than carload (LCL) movements,³⁵ similar to the restriction imposed upon the final offer arbitration process. This second qualification was evidence of the Canadian government's intention to assist by means of the CLR measures, only those shippers whose facilities were dependant upon railway service. Since such TOFC/COFC/LCL traffic could by their very nature be transported either by truck or by rail, these movements were deemed modally competitive and thus not requiring such regulatory protection.

Thirdly, the non-local railway wishing to trigger the implementation of the CLR mechanism was obliged to supply the railcars, pay for the maintenance and any modifications to the interchange which would be attributed to its usage thereof and utilize only the nearest connection between the two railways and the shipper's plant. These further legislative qualifications were perhaps intended to discourage short line railways from diverting longhaul traffic revenues away from local carriers without assuming their concomitant investment responsibilities.

Of the three new legislative recourses which have herein been described in Part III, the statutory duration of CLR appeal is the briefest, the National Transportation Agency being permitted only 45 days to settle any legal dispute concerning the precise calculation of the competitive joint line rate, the designation of the nearest interchange or the required level of service which were incumbent upon the local carrier (while losing its preferred longhaul routing) delivering or receiving traffic to or from the new connecting carrier.

Therefore, competitive joint line rate provisions were envisaged by Canadian transport policy-

makers in order to stimulate intramodal rail competition and thereby diminish the discriminatory effects of regional shipper dependence upon their respective local railway. By affording two active routing options where only one had existed previously, the CLR recourse was intended to enhance the freight rate negotiating potential of formerly captive shippers vis-a-vis their customary (local) carrier. This new regulatory structure may also have been intended to encourage greater efficiency within the Canadian railway industry by permitting the lower-cost carrier to divert traffic away from a competing railway with a greater variable and fixed cost to revenue ratio.³⁶

c) CASES OF COMPETITIVE JOINT LINE RATE APPEALS

Since the enactment of the new Canadian transport legislation, there appears to have been less usage of the competitive joint line mechanism, even as a deterrent element in negotiations, than either of the above-described final offer or the equity appeal recourse. Indeed, there have only been three recorded cases of CLR applications to the National Transportation Agency since January 1988, one involving Canada Packers in Lethbridge, Alberta which failed when CN, the connecting railway, refused to proceed further after the local carrier, CP Rail, acted in such an unco-operative manner so as to defeat the application, and the others involving Alberta Gas and Chemicals and CSP Foods, wherein the connecting carrier, Burlington Northern, diverted traffic away from a CP Rail longhaul routing.³⁷

The Canada Packers case was initiated when CP Rail increased its freight rates in 1988 on fresh beef in refrigerated railcars from Lethbridge, Alberta to Toronto and Montreal respectively by 25%, with a further 10% increase proposed. The shipper interpreted this significant price increase as being a further attempt by the carrier to "demarket" this type of transportation, as CP Rail had not invested in replacing its aging fleet of refrigerated equipment. Canada Packers therefore requested CN to quote a rate from Calgary to Montreal and upon assessing the rate as a reasonable one, demanded that CP Rail provide the shorthaul from Lethbridge to Calgary at a CLR which was calculated proportionately to the CN quotation. CP Rail disputed the shipper's method of computing the competitive line rate, which prompted the latter to apply to the National Transportation Agency for a formal resolution of this matter. CP Rail proceeded to discourage the CLR application by a) delaying the furnishing of rate information to the Agency beyond the 45-day statutory deadline by raising various legalistic objections and b) not providing adequate service during the CLR appeal to the applicant's major consignee, Chatel Meats of Montreal, which then decided to discontinue its usage of the rail mode in favour of motor carriers, after a carload of meat was delivered

by CP Rail, in a spoiled condition, approximately nine days late. Canada Packers was then obliged to withdraw its CLR application since there was no consignment of the merchandise.

The Alberta Gas and Chemicals case involved a shipper of methanol gas whose facility was local to CP Rail at Medicine Hat, Alberta and whose product was sold to a number of destinations in the United States. Chart XXXV depicts the rail routing options available to this company. As this commodity was required to be transported in railway tank cars, it was customary for such chemical shippers to lease or purchase their own equipment, rather than have the carrier provide this specialized car type.

Alberta Gas and Chemicals had previously received daily rail service from CP Rail whose longhaul routing included an interchange with its subsidiary the Soo Line at the North Portal border point (Interchange "A") for furtherance into the United States. However, as described above, there existed another Interchange "B" between CP Rail and the Burlington Northern at the Coutts, Alberta border crossing, which was within 750 miles of the shipper's origin facility.

Alberta Gas and Chemicals was faced with two obstacles when it undertook a risk-benefit analysis of the CLR option. Firstly, as their shipments involved multiple destinations, the statutory formula for calculation of a competitive joint line rate would have resulted in their being assessed a different rate from Medicine Hat to Coutts depending upon the subsequent BN mileage to diverse destinations. In order to avoid this requirement for such frequent per movement calculations, the shipper designated a preliminary BN destination which was common to all of its movements, i.e. Shelby, Montana, as the theoretical destination for purposes of the CLR's computation. This procedure was contested by CP Rail, but the National Transportation Agency decided in favour of Alberta Gas and Chemicals.

The second obstacle was that Burlington Northern could only provide service from the Coutts interchange three times a week, whereas the CP-Soo routing over Portal was daily. Therefore the shipper was compelled to lease double the number of tank cars and sacrifice a significant degree of its customary rail service, inventory and liability cost efficiencies in order to accommodate the new connecting carrier. The decision of Alberta Gas and Chemicals became more difficult in August, 1988 when CP Rail offered an out of court settlement which, if accepted, would have equalized the cost benefits to the shipper of Burlington Northern's 39 per cwt./rate offer. Nevertheless, the traffic manager of Alberta Gas and Chemicals chose to continue with the CLR application, perhaps out of a sense of appreciation to the BN's initial competitive efforts in regard to his company. The decision by the Agency in favour of Alberta Gas and Chemicals was then taken to the Federal Court of Appeal by CP Rail and hearings were scheduled

in the fall of 1989, more than one year after the decision of first instance. The shipper subsequently won this appeal as well.

The third CLR application was filed by CSP Foods with the objective of shorthauling CP Rail in favour of the BN on certain grain products. Although CSP Foods won before the Agency, CP Rail once again appealed the decision to the Federal Court and therefore this matter was still not resolved as of September, 1990.

d) CONCLUSIONS REGARDING THE EFFECTIVENESS OF CLR STRUCTURE

In discerning whether this new regulatory structure has effectively responded to the problem of transborder traffic diversion (Part I) and/or to the policy recommendations of industry pressure groups (Part II), the relative non-utilization of the CLR recourse would appear to indicate that the Canadian government has failed to achieve its legislative objectives in both categories. There have only been three CLR appeals in as many years. The primary flaw in the statutory drafting of the competitive joint line rate provisions may have been the errant assumption by Transport Ministry officials that the railways, if given the opportunity through a pre-defined legal methodology, would indeed wish to actively compete against one another. The oligopolistic nature of the Canadian railway industry, the co-operative aspects of most transborder rail traffic, the traditional culture of price collusion, as well as the fear of the local carrier retaliating by similarly attempting on different routings to divert the connecting carrier's captive long-haul revenues, all contributed to the disinterest exhibited by Canadian and American railways in participating in the CLR process.

Canadian manufacturers and producers whose facilities are captive to one railway have thus in practice, not been able since the enactment of the remedial legislation, to encourage a second more distant railway within the 750 mile statutory radius to bid upon their traffic from or to the nearest interchange point with the local carrier. Additionally, the Canadian government appears not to have adequately anticipated the traditional reticence of historically dependant shippers to seek either competitive railway bidding or Agency intervention, once the opportunity were available to them, due to a residual anxiety that their local carrier would stall the interchanging of the freight, thereby causing intolerable delays in transit time. Moreover the interconnectivity of the railway industry should perhaps have been recognized as an intrinsic factor which would render the CLR mechanism less likely to occur if it depended upon the

participation of an aggressive connecting carrier, many of whose other movements required the same local carrier's co-operation. For example, in 1985 CN and BN entered into a ten-year joint marketing and operating agreement to further their respective continental sales strategies. In these circumstances, the probability of the BN consenting to participate in a competitive joint line rate at the behest of a local CN customer so as to shorthaul their corporate partner would be minimal.³⁸

Therefore, by drafting the CLR provisions so as to necessitate pro-competitive intra-modal behaviour among traditionally co-operative railways, rather than structuring a similar mechanism which could have been evoked unilaterally by a captive shipper and subjected to a predefined statutory rate formula calculated independently by the Agency, the Canadian government ignored the predictable tendency of such carriers not to voluntarily compete and thus appears to have hampered the achievement of its transport policy objectives.³⁹

e) CONCLUSIONS TO PART III

In assessing the two hypotheses which were formulated in the introduction to Chapter 13 in the context of the transport industry's usage of the remedial legislation during the two years following its enactment, it appears that the regulatory solution devised by the Canadian policy-makers has only partially fulfilled its goals.

Hypothesis IX - That the objective which the government had set in the new regulatory framework of encouraging Canadian intramodal railway competition would not be achieved due to its permissive rather than penal statutory clauses. Q.E.D.

The purpose of Hypothesis IX was to test whether the remedial legislation enacted by the Canadian government would result in the intended change away from the previous non-competitive practices of price collusion between CN and CP Rail.

The evidence appears to suggest that the Canadian legislative solution was ineffective with regard to the encouragement of intramodal railway competition due to its enabling nature having been deemed sufficient, whereas enforcement provisions were instead required. The fact that only three CLR's have been initiated before the National Transport Agency since 1988 appears to confirm the hypothesis that neither Canadian railway would likely wish to shorthaul the other's captive clientele unless the legislation would have anticipated such risk-adverse behaviour and drafted compulsory pro-competitive measures rather than permissive ones. In order to break the longstanding patterns of uniform rate-setting within a

Canadian rail duopoly, the mere prohibition of collective pricing was clearly inadequate. The Canadian policy-makers erroneously assumed that CN and CP Rail were in favour of competing against one another and thus failed to recognize:

- a) the railway recommendations had not envisaged intramodal competition, but by contrast, had proposed mutual access to each other's confidential contracts.
- b) a price war would likely be perceived by both companies as depriving each of them of expected profit margins.
- c) inbred custom of non-competitive behaviour over several decades denoted attitudes which would not likely change unless a more radical modification in the law so required.

Hypothesis X - That the federal government did not adequately consider the effects of market sharing practices upon Canadian shippers by previously dominant railways in that the transport users would prove unaccustomed and unwilling to publicly dispute rate decisions of the rail carriers to which they were locationally captive. Q.E.D.

The evidence presented in Chapters 13, 14 and 15 respectively suggests this hypothesis to be valid. Not only did the Canadian policy-makers over-estimate the railways' will to compete, as has been discussed above, they may also have misjudged the shippers' aptitude for challenging the respective rate decisions of their formerly dominant rail carrier. In Chapter 10 it was noted that the general membership of several Canadian shippers' associations were still in favour of a protected schema of maintaining rate transparency, equalized joint international through rates and of ensuring that their particular rate levels were not less advantageous than others within the region. This, in addition to the absence of recommendations by shippers in favour of any individual rate appeal mechanisms, should have alerted Transport Canada planners that this constituency was prone to collective rate disputes in order to benefit their industry or region, rather than each company's private interests.

This reticence regarding individual rate contestation, when combined with the decades of railway-preferred legislation which had enabled CN and CP Rail to effectively determine the price, service frequency and equipment supply of such an essential element to any user-company's operations, should have been taken into account in the drafting of the rate dispute provisions. The fact that there have only been one or two CLR, FOA and equity applications per year during the post-National Transportation Act period provides confirmation of the validity of the underlying assumptions to Hypotheses IX and X

respectively. In conformity with Hypothesis IX, since CN and CP Rail have been unwilling to compete against each other, neither has agreed to act as the "connecting carrier" which the shippers first require in order to shorthaul the railway to which their company is local. In conformity with Hypothesis X, shippers have not wished to expose their companies to railway service retaliation nor to bear the other costs of delay, legal expense and uncertainty inherent in the CLR, FOA or equity appeal applications.

A variant of Hypothesis X was that in its legislative solution the Canadian government ignored an essential reason for the occurrence of the problems described in Part I, which was the divergence of regulatory policies between trading nations within a continental economy.

If one were to simplify the perceived cause by Canadian shipper and railway pressure groups of the commercial problems of transborder diversion examined in Part I, it would be that whereas the rail regulatory environment of the U.S. as of 1980 included confidential contracts, intramodal competition and a lessened role for the agency (ICC), the Canadian legislation by contrast was characterized by published tariffs and collective ratemaking.

This bi-national divergence of rail regulatory policies within a continental economy was apparently not recognized by the policy decision-makers as one of the primary causes of the above-described problem of revenue attrition as otherwise it would have remained for the Canadian government to revise its transport statute so as to be in harmony with the Staggers Act. The Canadian policy-makers opted instead to implement a new rail regulatory environment which was even more distinct from the U.S. deregulatory model, thereby accentuating the statutory disharmony and perhaps maintaining the principle cause of the problems described in Part I. The three regulatory appeal mechanisms described in Chapters 13, 14 and 15 respectively all have no corresponding structure in the U.S. law and therefore cannot be seen as being reflective of the Canadian government's recognition of the cause of the revenue problems which had beset its rail transport industry from 1981 onwards. Moreover, other features of the Canadian legislation which have been mentioned in the thesis but not discussed in detail, such as extended interswitching and joint track usage also had no counterpart within Staggers, thereby creating further structural disharmony.

If one accepts the theory that a government cannot effectively formulate legislation pertaining to transport without recognizing the principle of regulatory interdependency between trading nations, it would follow that the Canadian statutory solution was essentially flawed. The critical evaluation within Chapters 13, 14, and 15 respectively confirm that the remedial solution selected by Canadian policy-

makers has, at least initially, proven to be ineffective, as attested by the striking infrequency of usage by shippers of the FOA, CLR or equity appeal mechanisms respectively. Nor is there any substantive evidence to suggest that the hundreds of shippers who have not thus far used these mechanisms, considered them as viable strategies in their rate negotiations, or would employ any of them in the future.

Thus the Canadian government's response to U.S. rail deregulation was to heighten rather than to minimize the interventionist jurisdiction of its own regulatory agency, indicating a lack of appreciation for the necessary complementarity between the previous or present legislative regimes of trading nations sharing a continental economy.

END NOTES

30. Sections 134-143, National Transportation Act, 1987 and *Supra*, Chapters 11 (e) and 12 (i) (b).
31. Section 152, National Transportation Act, 1987, also, see Part II, end notes #2 and #116.
32. Section 137, National Transportation Act, 1987. The competitive joint line rate is calculated by adding the interswitching rate to the result of the following equation:

<u>Revenue of Connecting Carrier</u>	Amount by Which the No. of Miles
No. of Miles Transported by X	of the Local Carrier Exceeds
Connecting Carrier	Interswitching Mileage of 30 km.
33. From Vancouver, CN would be competing with CP Rail, which also served that city directly from and to Alberta. Sections 137(4) and 137(5), National Transportation Act, 1987.
34. Section 134(5) National Transportation Act, 1987. For further discussion on the possible legal interpretations of the term "cost effective", see Lande, R.J., Railway Law and the National Transportation Act, Butterworths, 1989, pp. 135 et seq.
35. Section 135(3), National Transportation Act, 1987. An exception was stipulated for such TOFC/COFC/LCL traffic if it were for import or export purposes. However, this exception would nonetheless prevent any U.S. railway from participating in the CLR if there were an alternate routing wholly within Canada which was cost-effective (Sec. 134(6)).
36. Although the Canadian railway lobbyists never invoked this labour-related argument and its public interest implications, the CLR mechanism could thus have the effect of allowing certain non-unionized U.S. railways to divert traffic away from unionized Canadian carriers due to the lesser cost burden.
37. Interviews with Mr. M. Armitage, corporate traffic manager, Canada Packers Ltd., in Toronto, May 1988, with Mr. T. Parks, traffic manager, Alberta Gas and Chemicals (now a subsidiary of Nova), in Edmonton, March, 1988 and June, 1989, and with Mr. D. Harris, traffic manager, CSP Foods, in 1990.
38. In 1987, the lumber division of the lumber marketing department of Burlington Northern decided to examine the feasibility of their using the new Canadian legislation to divert BC traffic away from the CN through the North Vancouver interchange. This departmental plan was subsequently disapproved by the U.S. company's senior management due to the above-cited CN/BN joint agreement.
39. Similarly, Transport Canada officials appear to have ignored an important historical lesson in that the joint track usage provisions which were in the former legislation and also were initiated only at the instance of a railway rather than of a shipper, had been involved only twice during the past forty years.

CONCLUSIONS

When evaluating the results of the ten hypotheses tested herein, as well as of the legislative solution which was designed by the Canadian Government in order to remedy the problem of transborder freight diversion and to respond to the policy recommendations of the four classes of pressure groups, there are several conclusions of a general order which appear to be warranted.

Firstly, were there any common themes manifested by all of the classifications of pressure groups?

As is evident from the foregoing analysis that even within given constituencies, there was no uniform thread of policy direction nor strategy selection (for example, Win-Win patterns), it was not in the area of specific conceptual adherence that any consensus by the members of all four Canadian pressure groups was to be witnessed. However, each pressure group had the full expectation that their respective recommendations, if successful, would have an impact upon the outcome of governmental deliberations. Thus each pressure group acknowledged that they were playing according to the rules of the same "game" and that the power to affect change to Canada's national transportation policy was held by the federal Minister of Transport.

In a study by Crozier and Thoenig of public policy formulation relating to certain French departments (regional governments),¹ a complex and partially organized system of pressure group and bureaucratic interdependency was described wherein certain members of political and economic elites, known as "notables", held important yet formally undefined roles of co-ordinating and representing the views of local institutions to the State Prefectures. Compared to the French process of policy formulation which was described as a "game..closed and secret", the Canadian model of federal agency public hearings and direct access between each pressure group and Ministerial officials appears to have been more explicit, participatory and structurally open.

Secondly, what was the nature of the relationships within and between the four pressure groups examined?

There appears to have been a significant degree of awareness and mutual concern within each category of Canadian pressure group relating to the policy recommendations and strategies selected by individual members. This intra-group communication was, however, rarely formally organized and may have been derived more from uncertainty pertaining to issues of competition and a customary desire not to be out of step with peer entities than any directed action in favour of collective co-ordination.

The Canadian railways were highly attentive to each other's policy objectives and their Parliamentary submissions, although distinct, were nonetheless complimentary products of duopolistic organizations which had traditionally consulted with one another and whose legislative goals, including greater branch-line abandonment freedoms, less agency intervention in rate-setting and protectionism against non-aligned U.S. railways, were virtually identical.

The provincial departments of transport, while remaining autonomous in the selection of their respective agenda for regulatory reform, were not unaccustomed to treating one another as members of a privileged sub-class with access to certain otherwise confidential internal plans regarding their province's likely response to the federal government's request for submissions. Although, the provincial briefs were highly divergent in content, the public servants drafting them showed many common positional traits with regard to their respective relationships with political and bureaucratic elements within their own departments, the corridors of communication with their federal counterparts, as well as the challenge of soliciting an appropriate level of local industry feedback. As partial evidence of the informal communication patterns and consequent mutual adjustment which occurred within this pressure group classification, one may consider (see provincial government submissions referred in the Bibliography) the collective reticence of most provincial governments, with the exception of Quebec and Alberta, to present any formal public submission regarding transborder diversion or transport policy recommendations to the Canadian Transport Commission until 1984-1985 though other pressure groups had generally found opportunities to submit their views by 1983.

Whereas the above evidence may be criticized as being circumstantial, much clearer proof of intra-group informational exchange and resultant adjustments in strategy selection is to be found among the shipper association category. As been analyzed in Chapter 10, there was an unprecedented turnaround of strategy exhibited by COFI, CITL, CP&PA and CCPA, which organizations were opposed to the confidential contracts, and in favour of collective rate making in September, 1983 and had all adopted the opposite views by October, 1984. It would be unreasonable to assume that such major policy

re-iterations would have occurred within all of the above four associations during the identical time frame, unless there had been substantial intra-group information and pressure to adapt each members public policy pronouncements so as to not be isolated from the strategy selected by other members.

The individual shipper classification appears to have exhibited a lesser degree of mutual awareness and consensual concern, although many corporate distribution officers would have received socialization pressures from membership in industry associations and were additionally conscious of their company's public profile when drafting formal transport policy submissions.

While there appears to have been a significant level of mutual awareness and consequent strategy adjustment within classes of pressure groups, in particular among the railways and shippers' associations, the responsiveness to policy positions as between pressure group categories was more difficult to assess. There existed a high degree of interest by the three pressure group categories in the submissions and public statements of the railways, and indeed many of the positions analyzed in Chapters 9, 10 and 11 were in direct response to the five-point agenda for regulatory reform which had been proposed by the Canadian railways in 1982. However, as has been mentioned in Chapter 12 (i) (f) the railways were neither concerned nor responsive to the submissions of the other pressure groups, in particular those of individual shippers associations and industry.

The "inter-reactivity" between the other three pressure groups, if it did exist, was informal, unstructured and followed the pattern of behaviour-determinant observation and self-evaluation which was outlined in Table XXXI. There were, inevitably, several instances wherein the strategy selection of a member of one pressure group would correspond to the policy recommendations of member(s) of another group. For example, there were striking similarities between the positions taken by both the Atlantic Provinces Transportation Commission and the Province of Nova Scotia. Moreover, the previously mentioned contract confidentiality turnaround of the four shippers' associations from 1983-1984 also manifested itself in a like reversal by the Province of Alberta and by several individual shippers (see Part II, endnote 111). However, it would constitute unsound logic to infer that only similarities in policy recommendations between members of two or even three pressure groups were the result of strong inter-group communication and socialization patterns, as the converse would not necessarily be true.

In a study by Leblebici and Salancik (1989) regarding distinguishing characteristics of sixty-four U.S. national trade associations, an empirical confirmation is offered of the Weberian definition of organizations being associative rather than communal, in the sense that in an associative relationship,

group members are primarily concerned with the purposes and outcomes of the collective activities.²

The relationship between Canadian transport pressure groups, other than the railways, appears, in like manner, to have been characterized by such associative qualities in that group members formed tentative and continuously changing inter-organizational ties while in the process of pursuing their own self-interests.

Had there been a higher degree of inter-reactivity between pressure groups, it is reasonable to assume that they would have exerted a greater influence upon the federal government decision-makers. For example, if the railways would have either co-ordinated the very similar representations of the Province of Quebec and Toronto Board of Trade with their own submissions, or actively encouraged collective action between like-minded individual shippers (and customers) such as Indusmin and other pressure group members, they may have enlarged their perceived power base and linked their regulatory proposals more effectively to the public interests.

Thirdly, were there any structural features or common elements in the role which the four pressure groups believed it was their respective mandate to fulfil which affected their lobbying effectiveness?.

It was seen in Part II of the thesis that two classes of pressure groups, i.e the shippers' associations and the provincial governments, were characterized by an inherent structural obstacle in that they were expected to represent the differing segments of their respective constituencies, some of which were inevitably in conflict regarding proposals for a new national transport policy, given each factions' distinctive locational, size, or competitive concerns. The members of these two categories of pressure groups were required to reconcile the opposing interests of their respective membership, which made the tasks of demonstrating leadership, satisfying their constituent communities, and selecting a coherent strategic direction very difficult. For example, how could the APTC devise a series of transport policy recommendations which would have satisfied both the Ports of Halifax and Saint John? How could the Province of Quebec adequately reconcile the interests of their northern shippers which were captive to one railway with the urban industrial community proximate to the border which stood to benefit differentially from increased intramodal Canadian and U.S. railways competition .

By contrast the pressure group classifications of railways and individual shippers were comparatively unimpeded in their respective strategy selection. It was not however the case that such structural freedom to construct uncompromised policy proposals to the problem of transborder traffic diversion

resulted in the submissions of these two pressure groups being any more imaginative or possessing a greater logical tenor or directional unity than the other pressure group members characterized by collective exigencies.

One cannot ignore the considerable evidence to the effect that there existed disharmony and substantial divergence in the policy recommendations within each class of pressure group, with the exception of the railways. Many of the submissions were contradictory, self-serving and inattentive to the probable concerns of the federal government decision-makers. Was it reasonable to expect the Minister of Transport to deregulate southbound traffic and not northbound traffic (APTC recommendation) or to allow confidential contracts while giving the two Canadian railways mutual access to such agreements (CP Rail proposal) ?

The self-imposed mandate of many Canadian pressure group members appears to have been limited to presenting the federal government with an optional package for regulatory reform from their sole perspective, without giving due consideration to the likelihood of such proposals being accepted by the Minister, given the latter's wider environmental concerns. By not focusing upon the perspective of the decision-maker, the pressure groups herein examined seemingly relinquished their potential to effectively influence the solution-finding exercise in which the Canadian government officials were engaged.

As a result of this somewhat restrictive self-definition of the role which pressure group members were content to play, the remedial legislation contained important elements, such as CLR's and the equity appeal, which none of them had proposed.

In a book by Pross which developed an analytical approach to the study of Canadian pressure groups, it was the author's view that the chief characteristic of the pressure group is its function of exerting political pressure so as to persuade governments to pursue public policies which are advocated by the group.³

When one considers the differential relationship between the activities and recommendations of pressure groups as evidenced in Part II and the legislative solution of the government as described in Part III, it would be fair to suggest that the influence by Canadian pressure groups upon the changed national transportation policy of Canada was not at all as effective as these constituencies had intended.

This ineffectiveness in policy suasion may be accounted, in addition to the above-stated elements of restrictive role definition, lack of inter-reactivity, and inconsistency in argumentation, by the difficulties which Canadian organizations which were culturally unfamiliar and commercially protected from the

dynamics of a competitive marketplace within their own industries, would have predictably encountered in adjusting to the pro-competitive ideology which continental transport deregulation engendered.

In summary, the following chart divides the ten hypotheses which have been tested throughout this thesis into three categories. Firstly, those hypotheses whereby the evidence evaluated establishes a preponderance of probability that they have been proven to be accurate are designated "valid". Secondly, those hypotheses which were demonstrated to be invalid, but their reversal would have proven accurate are designated "reverse-validity". Lastly, those hypotheses wherein the evidence did not demonstrate that was thought to be likely to occur, based upon logical premises, did in fact occur are designated "invalid".

Hypothesis	Valid	Reverse-Validity	Invalid
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Part I

I. That U.S. transport deregulation, by encouraging intramodal rail competition would likely cause an attrition of trade and traffic revenues in Canada, as the predictable cost-cutting and pro-competitive marketing practices characteristic of a less regulated environment in the U.S., would make Canadian products and transport services, the latter still constrained by price regulation, less desirable in the international marketplace.	X		
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Part II

II. That shippers would predictably seek greater competition between Canadian railways due to the expectation of lower freight rates and thus be in favour of new legislative measures similar to U.S. deregulation.			X
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Hypothesis	Valid	Reverse-Validity	Invalid
III. That shippers would exhibit different strategic positions based upon their respective size, market share, or captive/ competitive rail location, in that the larger and/or competitively located shipper would anticipate greater railway rate discounts and thus tend to be in favour of deregulation.	X		
IV. That shippers' associations would work together in order to present the government with a common set of policy plans, so as to achieve a cohesive lobbying approach, rather than permit regional base differences or inter-group competition to lead to significant strategic disparity.		X	
V. That provincial governments would predictably opt in favour of their shippers' policy requirements rather than the opposing recommendations of the railways, given the more important contribution of the former group to regional economic development, taxation and voting power.	X		
VI. That those provincial governments, the majority of whose shippers were locationally dependent upon only one railway, would be expected to favour a more protectionist national transportation policy, since the deregulatory benefits of greater competition between two Canadian carriers would not likely apply to them.	X		

Hypothesis	Valid	Reverse-Validity	Invalid
VII. That the government-owned railway, Canadian National, due to its being a crown corporation and subject to government directional authority, would not publicly oppose the draft legislation as aggressively as its privately-owned counterpart Canadian Pacific.			X
VIII. That their initial strategy for legislative reform having failed, the Canadian railways would then attempt to compromise their previous policy position so that only the most negative elements of the Bill (from their perspective) might be modified during the final Parliamentary hearings.			X

Part III

IX. That the objective which the government had set in the new regulatory framework of encouraging Canadian intramodal railway competition would not be achieved due to its permissive rather than penal statutory clauses.	X
X. That the federal government did not adequately consider the effects of market sharing practices upon Canadian shippers by previously dominant railways in that the transport users would prove unaccustomed and unwilling to publicly dispute rate decisions of the rail carriers to which they were locationally captive.	X

END NOTES

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